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No. 82-867

IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Questions Presented.*

1. Whether dismissal by the Federal Communications Commission of a license renewal application due to alleged bad faith discovery performance violates due process when the "bad faith" finding is based on an erroneous legal premise.

2. Whether due process requires that the validity of first amendment objections to discovery demands be adjudicated prior to imposing sanctions for refusal to comply with discovery orders and, if so, whether due process further requires that sanctions not be imposed where discovery has been resisted precisely in order to obtain a ruling on those first amendment objections.

3. Whether free exercise of religion is abridged where the government, without demonstrating a compelling governmental need, compels disclosure of the identity of church donors and the amount of their contributions even though a central theological tenet of that church and its contributing public donors is to give "in secret."

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*Petitioner Faith Center, Inc. has no parent companies, subsidiaries or affiliates within the meaning of S. Ct. R. 28.1.

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FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Faith Center, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 7, 1982, affirming orders of the Federal Communications Commission dismissing petitioner's television license renewal application and denying petitioner distress sale relief.

OPINIONS BELOW.

The judgment of the Court of Appeals is unreported and is reproduced in Appendix A (p. 1). The opinion and order of the Federal Communications Commission is reported at 82 F.C.C.2d 1 (1980), and is reproduced in Appendix D (pp. 5-68). The opinion and order of the Administrative Law Judge is unreported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 7, 1982. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on June 22, 1982. (Apps. B and C (pp. 3, 4)). On August 27, 1982, Chief Justice Warren E. Burger extended the time within which to file a petition for a writ of certiorari to and including November 19, 1982. (App. E (p. 69)). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED.

United States Constitution, Amendment I, Amendment V, which are printed in full in Appendix F (p. 70).

STATEMENT OF THE CASE.

A. Informal Investigation.

This controversy began in 1977 when investigators for the Federal Communications Commission ("FCC" or "Commission") appeared at petitioner Faith Center, Inc. ("Faith Center"), a 34-year-old congregational polity church with over 10,000 contributing members,[1] and demanded access to comprehensive financial records and interviews with bookkeeping personnel. 1 Jt. App. 58.[2] The Commission maintained that this information was needed in order to investigate allegations that television station KHCF-TV, which is licensed to Faith Center, had been used to solicit funds for purposes that subsequently were not

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[1]Dr. W. Eugene Scott is the elected Pastor of Faith Center and also President of the Full Gospel Fellowship of Churches and Ministers International, which is comprised of 2,000 member churches, including petitioner, with over 1.5 million congregants. Brief of Appellant 7 n.10, *Faith Center, Inc. v. FCC*, Nos. 81-1648 & 81-1649 (D.C. Cir. filed Nov. 24, 1981).

[2]"Jt. App." references are to the Joint Appendix filed below in connection with Appeal Nos. 81-1648 and 81-1649 in the United States Court of Appeals for the District of Columbia Circuit. A copy of the Joint Appendix has been lodged with the Clerk of this Court. References to "App." refer to the Appendix to this petition.

accomplished. App. 7.[3] While responding in part, Faith Center refused fully to comply with these unlimited demands because, among other reasons, the information requested, such as "accounts receivable ledgers" and other records, *id.*, would have required petitioner to reveal the identities of its donors and the details of their donations, matters which Faith Center is theologically mandated to keep secret. *See* § IIIB, *infra*. Accordingly, for these and other reasons, Faith Center asserted that these matters were "protected from governmental scrutiny by the religious freedom clauses contained in the First Amendment." *Faith Center, Inc.*, 69 F.C.C.2d 1123, 1124 (1978), 1 Jt. App. 50.

Thereafter, on June 15, 1978, the Complaints and Compliance Division of the Broadcast Bureau of the FCC wrote a "By Direction" letter again requesting compliance with its informational requests. 1 Jt. App. 49-54. In this letter, the FCC noted Faith Center's objections to investigation of "private church matters," but made the broad determination that "[a] licensee's operation of a public broadcast station may not be shielded from public scrutiny because of its standing as a religious organization." *Id.* at 52-53. Consequently, the FCC again demanded essentially the same broadly defined information that it had requested previously and warned that failure to comply would result in immediate designation for hearing of the station KHOF-TV license renewal application. *Id.* at 53.

In so doing, however, the FCC recognized that petitioner's objections had been "advanced in good faith and

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[3]The only sources of the allegations which prompted the investigation were, by the FCC's own admission, two disgruntled former employees. *See* 1 Jt. App. 91, 93-94. Both individuals subsequently admitted, however, that they had no knowledge or information that Faith Center had defrauded its audience or had made misrepresentations in its fund raising. 8 Jt. App. 2096-97; 9 Jt. App. 2178. Because these proceedings were aborted at the discovery stage, the truth of the allegations was never tested or, apparently, even taken into account by the Broadcast Bureau or the FCC.

in [petitioner's] sincere belief in their validity." *Id.* at 50. The FCC also recognized the sensitive nature of maintaining donor secrecy and the first amendment implications of mandating disclosure of such information. The FCC then believed that it could assess the validity of the allegations of misconduct against petitioner without production of donor information and therefore agreed not to demand such information at that time. *Id.* at 53 n.1.[4] Although Faith Center substantially complied with this FCC directive,[5] the Commission was not satisfied, and the license renewal application was designated for hearing. 1 Jt. App. 55-56.

B. Formal Proceedings Regarding License Renewal.

Notwithstanding this assurance by the FCC that it would not delve into the identity or donations of donors, the Broadcast Bureau immediately sought this and other information in its first set of interrogatories and production requests propounded in December, 1978. *See* App. 40, 43; Interrogs. 13-15; Doc. Prod. Reqs. 1, 2, 3, 5; 1 Jt. App. 81, 74-75. Faith Center responded to some of these interrogatories, 1 Jt. App. 111-20, but opposed the Broadcast Bureau's various attempts to compel further responses on a number of constitutional and procedural grounds, including the contention that by requiring revelation of individual donation records, many of the inquiries improperly impinged upon the free exercise rights of the church and its members. *See*

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[4]The Commission stated as follows:

> "Faith Center states that compliance with a Commission request to furnish the names of all persons contributing or pledging funds, and the disposition of each such pledge or contribution, would violate both the rights of the donors and the Church's right to protect the confidentiality of such persons. The Commission believes that it may be able to make a determination in this case without submission of this information and will not require its production, at least for the present."

1 Jt. App. 53 n.1.

[5]*See* Brief of Appellant 6, *Faith Center, Inc. v. FCC*, Nos. 81-1648 & 81-1649 (D.C. Cir. filed Nov. 24, 1981).

1 Jt. App. 112-13, 119-20, 125-26, 232-37; *see also* 5 Jt. App. 1270.

After hearing argument on March 30, 1979, Administrative Law Judge ("ALJ") Head refused to rule on the constitutional questions before him. While admitting that "it may well be that the constitutional argument could prevail . . .," the ALJ held that "if there are religious First Amendment defenses that will come up . . . those arguments can be made at the time of hearing, after the evidence is in." 8 Jt. App. 2047-48. Judge Head further indicated that he would not reconsider and in fact might be bound by the Commission's treatment and rejection of petitioner's first amendment arguments in the By Direction letter. *Id.* at 2042-43, 2045-48. The motion to compel was therefore granted. 1 Jt. App. 272-75.

Subsequent to this ruling, petitioner continued to press its constitutional claims. Faith Center first sought permission to appeal the order to the Commission, *id.* at 277-82, arguing, among other things, that a portion of the discovery being compelled involved information on pledges, which conflicted with the Commission's prior determination in its By Direction letter that such information should be excluded from scrutiny. *Id.* at 279, 295. On May 11, 1979 the ALJ rejected this request, primarily because Faith Center would "be able to make its Constitutional arguments on the merits" and therefore these arguments would not "lie to bar discovery." *Id.* at 296.

Faith Center thereafter unsuccessfully sought to obtain judicial review of the ALJ's ruling by interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit, again arguing, *inter alia*, "that the requests violated the Church's First Amendment rights and would result in an unwarranted entanglement by the Commission in church activities and affairs." 1 Jt. App. 1336-37. The Bureau filed a motion to dismiss this appeal claiming that the "interlocutory rulings of the ALJ are not final

orders appropriate for review by this Court under Section 402(b)" and that therefore the Court of Appeals lacked jurisdiction to review the case. App. 71-74. That motion was granted and the appeal was dismissed without reaching the merits on July 13, 1979. App. 75.

Finally, petitioner initiated a collateral action against the Commission in federal district court, again seeking an adjudication of its first amendment claims and urging that under no circumstances would it be appropriate to reveal its contributors. *Faith Center, Inc. v. FCC*, No. CV-79-02901-NML (C.D. Cal. filed Aug. 1, 1979); Transcript of Proceedings, at 18-20, 22-23 (Aug. 20, 1979). Judge Lucas dismissed this action based on the Commission's assurance that petitioner would have an opportunity at a later date to have its first amendment claims heard and decided both at the administrative and judicial levels. *Id.*, Transcript of Proceedings at 6-8, 9, 13, 29.

Within a week of the dismissal of the July 13 interlocutory appeal, petitioner responded to the discovery requests, 2 Jt. App. 319-27, attempting to comply with the Bureau's demands while strenuously urging that petitioner simply could not violate its trust relationship with its members by revealing their identities and contributions. *E.g.*, *id.* at 327C, D, G, H, Q. Further responses were filed approximately two months thereafter. *Id.* at 350-96. Nevertheless, on July 30, 1979 the Broadcast Bureau moved to dismiss petitioner's renewal application for its alleged failure fully to have responded to discovery. *Id.* at 329-43. In response to this motion, Administrative Law Judge Luton, who had replaced Judge Head on June 15, 1979, ordered Faith Center on August 6 and 8, 1979 to file additional responses to the Bureau's discovery requests, which included donor information. *Id.* at 345-46. Petitioner submitted further responses on August 17, 1979, *id.* at 350-85, but refused to reveal donor identities, urging that "the requested material would violate the directive of the Commission [in its By Direction

letter]. The licensee joins in this explicit recognition of the violation of first amendment rights occasioned by such a request." *Id.* at 352.

On August 22, 1979 the Bureau renewed its request for a ruling on its motion on narrowly delineated grounds. *Id.* at 397-99. Acknowledging that petitioner's August 17, 1979 responses satisfactorily answerd all of its interrogatories and three of its four document requests,[6] the Bureau emphasized that the "sole basis for [its] dismissal request is Faith Center's refusal to produce" certain videotapes which petitioner claimed it neither owned nor possessed. *Id.* at 517. Although the tape production was briefed by the parties, the Administrative Law Judge did not rule on this issue.

Suddenly, over one year after petitioner's renewal application had been designated for hearing and on the eve of the then-scheduled hearing, the Bureau filed a second set of interrogatories and requests to produce documents on October 1, 1979. 3 Jt. App. 551-84, 585-89. This set far exceeded the scope of the Bureau's first interrogatories and document requests. *See* App. 31. Petitioner objected to these discovery requests on various grounds, reasserting its constitutional objections. *E.g.*, 3 Jt. App. 578-79, 582-83; Opp. to Broadcast Bureau's Mot. to Compel at 7 (filed Nov. 9, 1979).

In a memorandum opinion and order released on December 4, 1979 the ALJ addressed and overruled most of petitioner's objections. 3 Jt. App. 656-59. Significantly, however, Judge Luton failed to decide petitioner's constitutional claims. In addition, the ALJ threatened that failure strictly

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[6]The Administrative Law Judge later criticized the content of Faith Center's responses in an order regarding a second set of interrogatories, 3 Jt. App. 660-63, and in his order dismissing petitioner's license renewal application, 4 Jt. App. 890 (citing prior analysis). In view of the fact that the party propounding the discovery expressed no such dissatisfaction, these observations are obviously irrelevant and constitute an insufficient basis on which to justify the dismissal of the renewal application.

to comply with the terms of his order could lead to dismissal of the renewal application. *Id.* at 659.

Prior to a ruling on an unsuccessful interlocutory appeal to the Commission in which petitioner reasserted the first amendment rights of the church and its donors, *id.* at 673-78, 713-14, petitioner responded to the Bureau's second set of interrogatories on December 14, 1979. In these responses, as it had from the beginning, petitioner objected "to each and every interrogatory which requests information revealing any contribution records." *Id.* at 679. Petitioner explained further that "[q]uestions requesting information about individual donation records clearly violate the Commission's express exception in its 'By Direction' letter of June 15, 1979." *Id.*

Unsatisfied with petitioner's responses, the Bureau filed a motion to compel answers on December 26, 1979. Petitioner, in turn, submitted supplemental responses on January 11, 1980, *id.* at 722-31, but otherwise, and again for constitutional reasons, opposed the Bureau's motion to compel. *Id.* at 732-45. In particular, petitioner pointed out that it could not fully comply with Interrogatory No. 3, which would require revelation of secret donor information. *See id.* at 738-40. The Bureau continued to disagree with petitioner's objections and therefore sought an order to show cause why Faith Center's license renewal application should not be dismissed for failure to prosecute. *Id.* at 751. Petitioner filed an opposition thereto on February 1, 1980. *Id.* at 761.

Shortly thereafter, on March 17, 1980, without even ruling on the motion to show cause or considering lesser sanctions, the ALJ dismissed petitioner's license renewal application on his own motion two weeks after petitioner had filed a declaration of distress sale, *see* § C, *infra*. 4 Jt. App. 889-97. The ALJ did so based on his conclusion that petitioner had failed to respond to the Broadcast Bureau's discovery requests in good faith and had thereby deliberately

obstructed the proceedings. 4 Jt. App. 897; *see* App. 37-38. In particular, the ALJ predicated its bad faith determination on petitioner's non-compliance with his December 4 discovery order regarding the Bureau's second set of interrogatories and document requests. 4 Jt. App. 897. As examples of petitioner's misfeasance, Judge Luton made reference to the inadequate responses to Interrogatories Nos. 3 and 36, both of which necessitated identification of donors and their contributions. *See id.* at 893, 896.[7]

Petitioner appealed to the FCC, which affirmed the dismissal on November 14, 1980. App. 54. The Commission agreed that dismissal was proper because petitioner's performance during the discovery phase of the proceedings displayed "bad faith." *Id.* at 42-43. In reaching this conclusion, the FCC placed "critical significance" on the July 13, 1979 summary dismissal by the Court of Appeals of petitioner's attempt to appeal on constitutional grounds the

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[7]Interrogatory No. 3 enjoined Faith Center to provide, *inter alia*, "[t]he identity of all financial records . . . consulted while at Faith" by "the bookkeepers and accountants who are/were employed by Faith and/or reviewed the licensee's financial records" and "[t]he identity of the financial records and books in which they made entries." 2 Jt. App. 553. This interrogatory required Faith Center to disclose the names of its donors as well as the details of each donation they made because to identify a document within the meaning of the interrogatories meant "to state the date, author, addressee, type of document . . ., a brief description of its subject matter, its present or last known location, and its custodian." *Id.* at 522. Of course the "financial records . . . consulted" by Faith Center's "bookkeepers and accountants" and those "in which they made entries" include all of the church's financial records. And since all donors' names appear in the records either as "author" or "addressee," to answer the interrogatory entails a disclosure of these names.

Interrogatory No. 36, which requests Faith Center to "[i]dentify each contribution record" of Dr. Scott, *id.* at 894, implicates the same free exercise interests. Pastor Scott, of course, has no less an obligation than has any of his congregants to "do not your alms before men." *Matthew* 6:1. Indeed, for Scott to reveal his contributions, while teaching his followers the error of that course, would represent a breach of faith on his part. Any distinction between Dr. Scott and other donors would have a disastrous effect on his ability to lead his flock in the way of the Lord. *See* 3 Jt. App. 679, 685.

broad governmental probe into the financial affairs of petitioner and its donors resulting from the Bureau's first set of interrogatories. *Id.* At this point, according to the Commission, the dismissal of petitioner's "attempt to vindicate [its constitutional] claims judicially" "clearly put [petitioner] on notice that its constitutional claims" were without merit and "furnished no basis" for refusing to comply with the discovery requests. *Id.* at 43. The Commission concluded that then, and only then, did Faith Center's failure to comply with discovery orders go "beyond pursuing its legitimate and appropriate remedies and become an abuse of process warranting dismissal of its application." *Id.*[8]

The Commission also analyzed some of petitioner's constitutional arguments and itself found them wanting. *Id.* at 30-37.[9] Significantly, however, at no point did the Com-

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[8]Indeed, the FCC could not have been more explicit in this regard. It summarized its position as follows:

> "Viewing Faith's discovery performance in light of all of the circumstances, we conclude that Faith's renewal application should be dismissed. . . . While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application. However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application."

App. 51-52.

[9]For example, the Commission held that the first amendment contention that any alleged misrepresentations are immune from liability because they are statements of religious belief rather than of secular fact, *see United States v. Ballard*, 322 U.S. 78, 85-88 (1944), must be resolved at the renewal hearing, not at the discovery stage, because the argument is in essence a defense to the charges. App. 32-33. The Commission also determined that its proceeding was the least restrictive method of preventing religious fraud. App. 34. *See Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940). The Commission further concluded that its proceeding did not entangle it in religious affairs and was consistent with *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 76-79 (1st Cir. 1979). App. 34-35. Finally, the Commission held that the possibility that Faith Center's conduct regarding its financial affairs,

mission ever consider the existence or scope of the free exercise interests of Faith Center donors in not having their identity and the details of their contributions revealed.[10] This omission occurred even though the donor identity issue had been raised from the beginning of the case — prior to the June 15, 1978 By Direction letter — and continuously thereafter throughout the discovery proceedings. The absence of any consideration of this critical issue is perhaps explicable due to the Commission's erroneous belief that the By Direction letter had removed this issue from the case, *see id.* at 8. This conclusion was unquestionably mistaken since, as even the Bureau admitted, *e.g.*, 1 Jt. App. 233 n.2, both sets of interrogatories unquestionably required disclosing the identity of donors.[11]

In sum, the Commission dismissed the renewal proceedings based on its finding of petitioner's bad faith in the discovery process. This finding was largely predicated on petitioner's refusal to reveal the identity of its donors after the July 13 dismissal of its interlocutory appeal on jurisdictional grounds.

The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the Commission

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"while open to question from a purely secular point of view — if indeed open to question at all — was nevertheless protected by the First Amendment" because of its theology was also a defense that could properly have been presented at the hearing, but not at the discovery stage. App. 36.

[10]The Commission noted that in some contexts the first amendment protects membership records from disclosure. However, this observation was made in the course of rejecting Dr. Scott's free exercise arguments on the ground that this principle does not generally extend to an organization's officials. App. 37 n.63.

[11]Faith Center thereafter petitioned the Commission for rehearing on December 3, 1980, asserting that among other errors, the Commission erred as a matter of law in concluding that the Court of Appeals' July 13, 1979 summary dismissal put petitioner on notice that its constitutional claims were invalid. Petitioner pointed out that since the dismissal was indisputedly based on lack of jurisdiction, the Court of Appeals had no authority to, and therefore could not have, considered the merits of the appeal. 6 Jt. App. 1373, 1386. The petition for rehearing was denied on May 12, 1981, without any consideration of the donor disclosure issue or discussion of this blatant misinterpretation of the July 13 dismissal. App. 76-78. Petitioner thereafter timely noticed its appeal to the Court of Appeals.

in an unpublished *per curiam* order "generally for the reasons given by [the Commission]." Nos. 81-1648 & 81-1649 (D.C. Cir. Apr. 7, 1982) (App. 1). The Court of Appeals thus adopted the Commission's conclusion that of "critical significance" in justifying the ALJ's bad faith determination was petitioner's continued assertion of its donors' first amendment rights after the Court of Appeals dismissed Faith Center's attempted interlocutory appeal on these issues on July 13. Like the Commission, the Court of Appeals also failed to address the free exercise interests of petitioner's donors.[12]

Thus, petitioner's license was revoked for refusing to divulge membership information which petitioner maintained was protected by the first amendment. This revocation occurred without *any* consideration of the free exercise interests of petitioner's donors, either by the ALJ, the Commission on appeal, or the Court of Appeals.

C. Distress Sale.

Based on discussions with the Commission, the Bureau and the ALJ beginning as early as January, 1979 (*see* Brief of Appellant Faith Center, Inc. to Court of Appeals, Nos. 81-1648, 81-1649, at 15-16 (filed Nov. 24, 1981)), petitioner filed with the ALJ on October 30, 1979 a motion for a continuance of the renewal proceeding while petitioner exercised its right to petition the Commission for distress sale relief.[13] In its motion, petitioner explained that, unable to obtain a ruling on its constitutional claims, threatened

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[12]Faith Center's petition for rehearing and suggestion for rehearing *en banc* were denied on June 22, 1982. App. 3-4.

[13]The Commission originated the distress sale option in 1978 for the following reason: "[I]n order to further encourage broadcasters to seek out minority purchasers, we will permit licensees . . . whose renewal applications have been designated for hearing . . . to transfer or assign their licenses at a 'distress sale' price to applicants with a significant minority ownership interest. . . ." *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978) (footnote omitted).

with motions to dismiss, confronted with a massive new wave of discovery and lacking the resources to proceed, it had no alternative but to seek distress sale relief. 3 Jt. App. 587-96. The ALJ denied petitioner's continuance motion and dismissed the license renewal application before the Commission had an opportunity to rule on the distress sale petition. *Id.* at 631-32.

The Commission ultimately denied Faith Center's petition for distress sale relief in the same order in which the Commission affirmed dismissal of petitioner's renewal application. App. 5-68. This denial was based on the Commission's conclusion that petitioner's conduct during discovery had been in bad faith and that petitioner therefore should not have the benefit of a distress sale. App. 51-53. As stated in the denial of Faith Center's petition for reconsideration of the Commission's denial of the proposed distress sale "the Commission affirmed the [license renewal] dismissal . . . and, so as not to insulate [petitioner] from the consequences of its misconduct denied the distress sale proposal as to that station." App. 81. The Court of Appeals affirmed this ruling in its unpublished order discussed *supra*, for the same reasons stated by the Commission. *See* App. 1.[14]

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[14]*See* note 12, *supra*.

REASONS FOR GRANTING THE WRIT.

I.
THE QUESTIONS ARE IMPORTANT.

This petition concerns the manner in which the FCC treated the free exercise rights of members of an "electronic church" and the nature and extent of those rights in the discovery stage of license renewal proceedings. Specifically, the issues are whether, consistent with the first amendment and procedural due process, a central theological mandate requiring church followers to give donations in secret may be overridden without first requiring the Government to demonstrate a compelling interest in the identity of donors and the details of their giving. A related question is under what circumstances due process permits dismissal of administrative proceedings for alleged "bad faith" discovery performance. These issues, involving the scope of free exercise and due process rights of church broadcast licensees, are important questions of constitutional law which this Court has never directly addressed.

Churches are increasingly using electronic media as the principal means of disseminating their beliefs.[15] The need of both the FCC and these religious broadcasters for delineation of the constitutional contours of regulation in this area, the significance of the constitutional rights at stake, the drastic implications of the decision below on the exercise

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[15]The number of religious broadcasters cannot be precisely determined, but it is significant. There are 1,400 radio stations and 36 television stations that "specialize in religious broadcasts with religious radio stations starting up at the rate of about one a week and TV stations about one a month." Chandler, *The Electronic Church — Big Time Religion*, L.A. Times, Feb. 25, 1980, § 1, at 1, col. 1. This list does not include religious broadcasters who transmit via satellite and cable. *See id.* The roster of religious broadcasters includes both "independents" such as Billy Graham and Oral Roberts and clergymen affiliated with traditional denominations such as Rev. Robert Schuller (Reformed Church in America). *Id.* at 15, col. 3. In the near future, other traditional denominations are likely to enter the field. *See id.* at 17, col. 2 (United Methodist Church considering large-scale station ownership).

of the rights of all religious broadcasters, and the great value of the licenses at stake strongly suggest that review by this Court is not only appropriate, but necessary.

II.

THE DISMISSAL AND REJECTION OF DISTRESS SALE RELIEF DENY DUE PROCESS BECAUSE THE UNDERLYING FINDING OF BAD FAITH IS ERRONEOUS AS A MATTER OF LAW.

A. The Bad Faith Finding Rests Upon a Legally Erroneous Predicate.

"[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 209 (1958). When a party is unable to comply with a pre-trial discovery request, "substantial constitutional questions are provoked." *Id.* at 210. Consequently, dismissal for "noncompliance with a pretrial production order" is proper *only* when "it has been established that failure to comply has been due to . . . willfulness, bad faith, or any fault" of the party. *Id.* at 212 (interpreting Fed. R. Civ. P. 37); *accord, National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 640 (1976) (per curiam).

The Commission found that only after the July 13, 1979 summary dismissal of petitioner's appeal to the District of Columbia Circuit did petitioner's discovery performance amount to bad faith and thus warrant dismissal of the proceedings. App. 51-52. The Commission attached "critical significance" to this dismissal by the Court of Appeals, reasoning that it was not until this time that petitioner was "clearly put on notice that its constitutional claims furnished

no basis for refusing to comply with the ALJ's determination as to the propriety of discovery requests. . . ." App. 43.[16]

The July 13, 1979 "summary dismissal . . . on constitutional grounds" thus is the linchpin of the Commission's bad faith determination. But for this dismissal, Faith Center's alleged failure to comply with discovery orders "might not have warranted dismissal" of the license proceedings.

However, *the July 13, 1979 dismissal of petitioner's appeal was not on the merits*, much less on constitutional grounds. The Commission had filed a motion to dismiss the appeal on the basis that the Court of Appeals lacked jurisdiction to hear it, arguing that the ALJ's interlocutory rulings were not final orders appropriate for review. App. 71-74. The Court of Appeals explicitly granted that motion and accordingly "dismissed" the appeal for lack of jurisdiction. App. 75; *see English v. Cunningham*, 282 F.2d 839 (D.C. Cir. 1960) (per curiam). It is elementary that there is no consideration of the merits when an appeal is dismissed on jurisdictional grounds. *Furr's Cafeterias, Inc. v. NLRB*, 566 F.2d 505, 507 (5th Cir. 1978).

Hence, the Commission's finding of "bad faith" was based on an essential and manifestly false premise — that the order of the Court of Appeals "put to rest" petitioner's constitutional claims. App. 51. The Commission admits that but for this "critically significant" assumption, a finding of "bad faith" is unwarranted. *See* note 8, *supra*. Since the bad faith finding is indefensible because it is predicated on a legally erroneous interpretation of the nature of the July 13 order, both the dismissal of petitioner's license renewal

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[16]The Commission also refers to its By Direction letter as possibly putting Faith Center on notice that its constitutional objections to discovery were meritless. This letter, however, explicitly disclaims any intention to seek donor records at that time. *See* note 4, *supra*. At least as to donor records, therefore, Faith Center was never "put on notice" that its objections lacked validity until, at the earliest, the dismissal of its application by the ALJ.

proceedings and the denial of distress sale relief are similarly indefensible. For, absent the finding of bad faith, dismissal of these administrative proceedings without affording petitioner an opportunity to present its constitutional claims and be heard on the merits was a blatant denial of due process of law.

B. Due Process Requires That First Amendment Objections to Discovery Be Adjudicated Prior to The Imposition of Sanctions.

The fundamental due process right to be heard[17] demands that sanctions not be imposed for attempting to vindicate first amendment claims which are far from frivolous. *Cf.* Fed. R. Civ. P. 37(a)(4) (sanctions not to be imposed for objection to discovery if party's position was substantially justified). That petitioner's first amendment objections were certainly substantial, highlights the gravity of this deprivation here. The refusal to disclose donor identities that precluded complete responses to the Bureau's discovery requests was firmly rooted in the free exercise clause of the first amendment. *See* § III, *infra*. Under these circumstances, a party should not be forced to wager valuable secular interests upon the prospect that his free exercise rights will ultimately be upheld.[18] Yet this Hobson's choice is precisely what was forced upon petitioner.[19]

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[17] *Grannis v. Ordean*, 284 U.S. 385, 394 (1914); *accord, Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *see Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 165-72 (Frankfurter, J. concurring).

[18] Putting a party "to a choice between fidelity to religious belief" and the *risk* of loss of a secular entitlement has a "coercive impact" on the free exercise of religion, *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981), different only in degree from the coercive impact of the actual choice between fidelity to religious belief and the certainty of secular loss. *Cf., e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("chilling effect" of threat of sanctions upon protected expression).

[19] The secular interests here at stake involve considerably more than the license to operate station KHOF-TV. Petitioner is a licensee of two other television stations and one FM radio station. App. 60. Both the Bureau and the Review Board have already made clear in license renewal

(footnote continued on following page)

Repeatedly stating that petitioner's religion clause claims were not assertable during discovery proceedings, the ALJs never ruled on these constitutional claims. *See* Statement of the Case, *supra*. Neither did the Commission consider petitioner's donor disclosure claims. *See id.* The ALJ and the Commission thus put Faith Center in the unconscionable position of either foregoing the religious privacy objections of the Church and its members — claims never adjudicated or ruled upon — or insisting on its right to a ruling on those objections, thereby risking dismissal of its renewal application and loss of its television station. That petitioner's claims could be raised after discovery is no answer to this dilemma since it is the exposure of private religious matters in violation of the free exercise clause that constitutes the constitutional damage. This damage occurs when the disclosure takes place and is irreparable. Even a later ruling in favor of petitioner could not undo the constitutional wrongs already wrought. The only viable means to protect these constitutional rights is to prevent disclosure in the first instance by requiring an immediate ruling on the merits of the constitutional claims.

This Court has often recognized that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-521 (1958). Accordingly, the Court has evolved a series of specific due process rules carefully designed to prevent insensitive procedural devices from infringing upon first amendment interests. *See* Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1970). Because first amendment rights are "vulnerable

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proceedings involving the FM station that they consider all constitutional claims raised in the TV proceeding res judicata and therefore they will not permit petitioner to assert those claims in any subsequent proceedings involving petitioner's other licenses. *See* App. 86-87. Thus, because of a constitutionally deficient proceeding involving one license, petitioner will lose all of its other licenses as well.

to gravely damaging yet barely visible encroachments," governmental intrusions on such interests must "embody the most rigorous procedural safeguards." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

Compelled disclosure of private associational matters constitutes not merely a "barely visible encroachment," but a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (plurality opinion). Indeed, precisely because compelled disclosure of such matters can be an "effective restraint" on freedom of association, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), such disclosure must be subject to "exacting scrutiny." Thus, it necessarily follows that disclosure which implicates fundamental first amendment interests should be preceded by an adjudication of its constitutional validity. *See Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964).

The same is obviously true when, as here; disclosure would effectively restrain free exercise rights. Petitioner simply sought to vindicate the free exercise rights of its members. To do so, petitioner needed to obtain an adjudication of these religious privacy claims during discovery prior to compelling disclosure of donor information. Since petitioner was not given this opportunity, its members did not receive the due process which the first amendment requires. In the absence of an adversary determination of petitioner's constitutional claims, based on meticulous scrutiny of the Bureau's showing of its need for discovery prior to compulsory disclosure, the orders compelling that disclosure and the resulting dismissal of the renewal application and rejection of distress sale relief are constitutionally invalid.

Moreover, when a party resists discovery precisely in order to obtain a ruling on his first amendment objections, he should not be required to do so at his peril. Otherwise, "[t]he threat of sanctions may deter" the assertion of valid

first amendment privileges "almost as potently as the actual application of sanctions" would do. *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see New York Times Co. v. Sullivan*, 376 U.S. 254, 277-80 (1964) (inhibiting effect of libel awards on vigorous public debate necessitates constitutional privilege). "[F]irst amendment due process," *Monaghan, supra*, at 551, therefore requires that a party not be sanctioned for seeking an adjudication of his first amendment privacy rights.

III.

COMPELLED DISCLOSURE OF THE IDENTITY OF FAITH CENTER DONORS VIOLATES THE FREE EXERCISE CLAUSE.

A. The Free Exercise Clause Requires All Possible Accommodation Between Religious Exercise and Secular Regulation.

The Government may restrict religiously motivated behavior only if a "compelling state interest" is served. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). "[N]o showing of a rational relationship to some colorable state interest . . . suffice[s]; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation' . . . ." *Id.* The Government also must show that no alternative means exist that would achieve its end "without infringing First Amendment rights." *Id.* at 407.

The requirement that a compelling governmental interest be shown if free exercise of religion is to be abridged embodies the perception that only the most imperative demands of public order "in the nature of things" require restrictions of religious freedom. "[T]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *accord, Thomas v. Review Board*, 450 U.S. 707, 718

(1981). The decisions holding such claims to be overbalanced "have invariably" rested on the existence of a "substantial threat to public safety peace or order." *Sherbert, supra*, 374 U.S. at 403. Thus, even such paramount government interests as compulsory education of youth, *Yoder, supra*, 406 U.S. at 221, or the uniform application of narcotics laws, *e.g., People v. Woody*, 61 Cal.2d 716, 723-26; 394 P.2d 813, 818-20, 40 Cal.Rptr. 69, 74-76 (1964), must yield to the dictates of conscience.

B. Giving "In Secret" to Faith Center Unquestionably Implicates Free Exercise Values.

That donating to Faith Center constitutes religious exercise cannot be seriously controverted. The Faith Center follower is commanded to "[l]ay not up . . . treasures upon earth," *Matthew* 6:19, but instead to "lay up . . . treasures in heaven," *id.* 6:20.[20] "[T]he means of laying up treasures in Heaven is to give them to His church and to the ministries of His church under the direction of the ministers ordained to be responsible for His church." 1 Jt. App. 181. By the very act of giving, the donor expresses his belief that he is laying up "treasures in Heaven" following the example of the early Christians, *see Philippians* 1:1, by making "a sacrifice acceptable, well pleasing to God," *id.* 4:18, to His church, and to its ministries under the direction of His ministers. *See also Philippians* 4:17 (gift is made so that "fruit may abound" to eternal account of donor).

That the identity of the donor and the details of this donation be disclosed to no one other than the ministers of the Lord is of the utmost importance. If there is to be a spiritual as well as an eternal reward for a donor's faith-action, his contribution *must* be "in secret" known only to

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[20]To the Faith Center adherent material well-being is a decidedly secondary concern when compared to his spiritual well-being. *See Matthew* 6:28-31 (believers should not worry about material things "for like the lilies of the field," God shall clothe those who have faith).

Him who "seeth in secret himself" but "who reward[s] openly." *Matthew* 6:4.[21] Thus, if a donor's gift should become known, he will "have no reward" in Heaven. *Id.* 6:1. For this reason, the pledge receipts under which all donations are made represent that petitioner will maintain the confidentiality of all information regarding donors and their donations. *See* App. 88.

Compelled disclosure of the identity of petitioner's donors and the details of their contributions therefore directly violates a central tenet of Faith Center's religious teachings and of its donors' religious beliefs. Hence, such disclosure may be justified only by a showing of a compelling governmental interest achievable by no less restrictive means.

C. The FCC Did Not Demonstrate a Compelling Government Interest Sufficient to Justify Compelled Disclosure of Donor Records.

The orders compelling disclosure of donor information unquestionably inflict grave harm upon a constitutionally protected interest, possibly the most fundamental of all constitutional rights.[22] This harm to free exercise is even more direct and just as insidious as the harm to the associational interests at issue in *NAACP v. Alabama ex rel. Patterson*, *supra*, 357 U.S. at 463. The harm found in *NAACP* flowed from the likelihood "of the consequences of . . . exposure" of beliefs that would result from compelled disclosure of

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[21]The remainder of the Biblical passage upon which this belief is based emphasizes the need for secrecy and privacy.

> "Therefore when thou doest thine alms, do not sound a trumpet before thee, as the hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, they have their reward. But when thou doest alms, let not thy left hand know what thy right hand doeth: That thine alms may be in secret. . . ."

Matthew 6:1-4.

[22]*Jones v. Opelika*, 316 U.S. 584, 621 (1942) (Murphy, J., dissenting), *adopted per curiam as majority opinion*, 319 U.S. 103, 104 (1943).

the names of members of the organization. *Id.* at 462. The possible consequences of such disclosure included "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* That these consequences would ensue was readily inferable from the "uncontroverted showing" that they had resulted from revelation of the identity of members "on past occasions." *Id.* In the instant case, the harm resulting from donor disclosure is a virtual certainty since it is the disclosure itself that contravenes the free exercise rights in question. Thus, it necessarily follows that here, as in *NAACP*, compelled disclosure violates the first amendment unless a compelling governmental interest is shown.[23]

The protections of *NAACP* were subsequently extended to cover the identity of financial supporters and donors as well as members. *Buckley v. Valeo, supra,* 424 U.S. at 71. In *Buckley,* the harm to the constitutional interest stemmed from the recognition that "[i]n some instances" disclosure can "deter contributions to the point where the movement cannot survive." *Id.* This reasoning applies with even greater force in this case because compelled disclosure would deter donations and therefore destroy the theological under-pinnings of petitioner's religious movement. *See* § IIIB, *supra.*[24]

[23]*NAACP* is conclusive evidence that an adjudicatory system can accommodate carefully monitored first amendment exemptions from discovery demands. This critical feature renders *United States v. Lee,* 102 S.Ct. 1051 (1982), inapposite since *Lee* rejected a free exercise-based objection to taxation because the tax system could not otherwise function and no accommodation was therefore possible. *Id.* at 1056.

[24]For a recent case holding that compelled disclosure of information almost identical to that sought by the FCC here violates the right of associational privacy, *see FEC v. Hall-Tyner Election Campaign Committee,* 678 F.2d 416, 418 (2d Cir.), *petition for cert. filed,* 51 U.S.L.W. 3099 (U.S. Oct. 4, 1982) (No. 82-198).

This Court is currently considering the degree of probability of harm to the exercise of associational rights necessary to invoke the right of privacy created by *NAACP* — whether "only isolated instances of harassment directed to the organization or its members" within a particular state in recent years is sufficient. *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776 (U.S. argued Oct. 4, 1982) (Jurisdictional Statement i). Resolution of this issue will likely prove, as petitioners assert, that the protections afforded by *NAACP* and *Buckley* apply to all cases in which there is "a reasonable probability," *Buckley*, 424 U.S. at 74, that the exercise of any first amendment right, especially a right as important as free exercise, will be chilled by disclosure of the identities of financial contributors.

Whether or not *Brown* directly addresses this question, it cannot be denied that the "consequences of exposure" of the identities of Faith Center donors will be devastating to the free exercise of religion. *See* § IIIB, *supra*. Therefore, the Government must demonstrate "an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect . . . which these disclosures may well have on the free exercise by petitioner's members" of their religion. *NAACP*, *supra*, 357 U.S. at 463. That interest, moreover, must be "compelling." *Thomas v. Review Board*, *supra*, 450 U.S. at 718 *Sherbert v. Verner*, *supra*, 374 U.S. at 406.[25]

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[25]The Government must demonstrate that the information sought goes to the "heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); *UAW v. Nat'l Right to Work*, 590 F.2d 1139, 1153 (D.C. Cir. 1978); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir.), *cert denied*, 417 U.S. 938 (1974). In addition, the Government must demonstrate that it has exhausted all other alternative sources for acquiring the information. *See UAW v. Nat'l Right to Work*, *supra*, 590 F.2d at 1153; *cf.*, *Zerilli v. Smith*, *supra*, 656 F.2d at 713; *Carey v. Hume*, *supra*, 492 F.2d at 636; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1978); *Baker v. F & F Investment Co.*, 470 F.2d 778, 784 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Miller v. Transamerica Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980).

Neither the opinion of the ALJ, *see* 4 Jt. App. 894, nor that of the FCC, *see* App. 43-51, evidences any particularized need on the part of the Broadcast Bureau for the material which Faith Center could not provide without impinging upon the free exercise interests of its followers. Indeed, except for the donation records of the pastor of Faith Center,[26] the matter was not considered directly at all.[27] Furthermore, far from requiring the Bureau to demonstrate a compelling governmental interest, the Commission placed the burden of proof on petitioner generally to "demonstrat[e] that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." App. 37.[28] Since the existence of a compelling governmental need

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[26]The Commission's entire discussion of this subject, which arises in the context of rejecting the contention that the initial exemption of donor records in its By Direction letter applied to Dr. Scott, is that "[t]he distinction between Dr. Scott's records and the records of rank and file contributors has always been clear." App. 44. Why the distinction is "clear" is not explained, nor is there any attempt to establish a greater need to override Dr. Scott's free exercise interests than the free exercise interests of the rank and file.

[27]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, the FCC deemed that continued assertion after the July 13 dismissal of petitioner's appeal to be the fundamental justification for the dismissal of the license renewal proceeding. *See* § IIA, *supra*. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970); *Stromberg v. California*, 383 U.S. 359, 369-70 (1931).

[28]Moreover, without detailed fact findings, it would be impermissible even to assess the competing interests at stake. The ALJ made no findings at all concerning the secrecy interests of Faith Center adherents, no evaluation of the sincerity or centrality of those beliefs, and no assessement of the strength of the Broadcast Bureau's need to violate them other than an elementary evaluation of the relevance of the discovery demands. Only with such factual findings could the FCC and the Court of Appeals determine whether petitioner's discovery performance demonstrated bad faith. The lack of findings therefore renders the dismissal of petitioner's renewal application and rejection of its distress sale proposal a gross denial of due process.

was not even addressed, much less found, the discovery orders and the dismissal of petitioner's license renewal proceeding for failure to comply with those orders cannot stand.

CONCLUSION.

For each of the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A.

Judgment.

United States Court of Appeal for the District of Columbia Circuit.

September Term, 1981.

Faith Center, Inc., Appellant, v. Federal Communications Commission. No. 81-1648 & No. 81-1649. FCC 81-235.

Filed: April 7, 1982.

Appeals from Orders of the Federal Communications Commission. Before WRIGHT, WILKEY, and WALD, Circuit Judges.

These causes came on to be heard on appeal from the Federal Communications Commission and were briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. *See* Local Rule 13(c).

This court is in agreement with the result reached by the Commission, generally for the reasons given by it in *Faith Center, Inc.*, 82 FCC2d 1 (1980), *reconsideration denied*, FCC 81-235 (1981) (Joint Appendix 1333, 1925). *See United States v. Lee*, ... U.S. ..., ..., 50 U.S.L.W. 4201, 4204 (Feb. 23, 1982); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974). *See also Faith Center, Inc.*, 69 FCC2d 1123, 1126-1127 (1978) (JA 49, 52-53) (FCC's "By Direction" Letter of June 15, 1978); *cf. Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981). We find no abuse of discretion or procedural default.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the orders of the Federal Communications Commission appealed from in these causes are hereby affirmed.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

APPENDIX B.

Order.

United States Court of Appeals for the District of Columbia Circuit.

September Term, 1981.

Faith Center, Inc., Appellant, v. Federal Communications Commission, Appellee. No. 81-1648.

And consolidated case No. 81-1649.

Filed: June 22, 1982.

Argued: 3-29-82.

BEFORE: Wright, Wilkey and Wald, Circuit Judges

The Clerk is directed to file appellant's petition for rehearing and on consideration thereof, it is

ORDERED that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C.

Order.

United States Court of Appeals for the District of Columbia Circuit.

September Term, 1981.

Faith Center, Inc., Appellant, v. Federal Communications Commission, Appellee. No. 81-1648.

And consolidated case No. 81-1649.

Filed: June 22, 1982.

Argued: 3-29-82.

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges.

The Clerk is directed to file appellant's suggestion for rehearing *en banç* and on consideration thereof, and no judge of the Court having called for a vote thereon, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX D.

Memorandum Opinion and Order.

Appeal, From Initial Decision, Sustained
Licensee, Effect of Misconduct
Renewal, of License, Denied or Dismissed

Commission sustains ALJ's order dismissing broadcaster's renewal application and denies petition for special relief. Licensee did not participate in discovery phase in good faith and consistently failed to answer interrogatories and failed to produce documents. BC 78-326

FCC 80-602

Before the Federal Communications Commission, Washington, D.C. 20554.

In re Application of Faith Center, Inc. Station KHOF-TV San Bernardino, California. BC Docket No. 78-326. File No. BRCT-746.

For Renewal of License,

(Adopted: October 9, 1980; Released: November 14, 1980)

By the Commission: Commissioner Jones absent.

I. Background

1. Faith Center, Inc. (Faith) appeals from an order of Administrative Law Judge Edward Luton dismissing Faith's application for renewal of its license to operate station KHOF-TV, Channel 30, San Bernardino, California.[1] Also before the Commission for consideration of Faith's petition for special relief, filed February 29, 1980, proposing a

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[1]FCC 80M-459, released March 7, 1980. Faith filed its appeal May 7, 1980, the Broadcast Bureau filed an opposition on June 12, Faith replied on July 21, the Broadcast Bureau commented on the reply August 22, and Faith and TELACU filed further comments on September 17.

"distress sale" of KHOF-TV and two co-owned stations, KVOF-TV, Channel 38, San Francisco, California, and WHCT-TV, Channel 18, Hartford, Connecticut.[2] The parent corporation of the proposed minority purchasers, The East Los Angeles Community Union (TELACU), on May 7, 1980, appealed the dismissal order and simultaneously renewed an earlier motion to intervene in these proceedings.[3]

2. Faith is as a nondenominational Christian Church founded in 1947 and headquartered in Glendale, California. Faith and an affiliated church also involved in these proceedings, Wescott Christian Center (Wescott), are members of the Full Gospel Fellowship of Churches International. Dr. W. Eugene Scott serves as the president and pastor of Faith and Wescott and the president of the Full Gospel Fellowship. Faith received licenses to operate KHOF-FM in 1957 and KHOF-TV in 1972. Faith acquired WHCT-TV in 1972 and KVOF-TV in 1973.

3. By Order and Notice of Apparent Liability, FCC 78-674, released October 11, 1978, the Commission designated Faith's renewal application for hearing. Four issues were designated:

(a) To determine all the facts and circumstances surrounding Faith Center, Inc.'s failure to permit Commission access to certain licensee books, records and employees.

(b) To determine whether Faith Center, Inc., failed to submit information requested by the Commission in the Commission's letter dated June 15, 1978.

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[2]Supplements to the petition were filed March 3, March 21, and April 29. The Broadcast Bureau filed statements March 11, May 9, and July 10 to which Faith and TELACU responded July 22. Assignment applications covering the three stations were filed April 25.

[3]TELACU originally addressed a motion for leave to intervene to the Presiding Judge on March 13, 1980.

(c) To determine whether in its over-the-air fund-raising broadcasts, Faith Center, Inc., violated, or is in violation of, Title 18, United States Code Section 1343.[4]

(d) To determine, in light of the evidence adduced under the preceding issues, whether the applicant possesses the requisite qualifications to be or to remain a licensee of the Commission, and whether a grant of a captioned application would serve the public interest, convenience and necessity."

The order also served as a notice of apparent liability in the amount of up to $20,000.

4. Pursuant to the designation order, the Broadcast Bureau, on November 9, 1978, filed a bill of particulars. The bill of particulars recites that on September 19, 1977, Commission investigators visited the licensee's offices in Glendale, California, and informed the licensee's personnel that they were investigating allegations that KHOF-TV had been used to solicit funds for specific purposes and that the funds collected were not expended as indicated in the over-the-air solicitations. The investigators requested the licensee to provide accounts receivable ledgers, lists of solicitations and monies received and records of money spent on each project for which funds were solicited, and asked to interview bookkeeping personnel. These requests were refused. In an October 31, 1977 letter, the Commission, specifically, the Broadcast Bureau's Complaints and Compliance Divi-

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[4] "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U.S.C. §1343 (1977).

sion, requested Faith to submit copies of cash receipts and disbursements journals, a list of projects for which funds were solicited, a list of expenditures made on these projects, a list of former station employees, a list of Dr. Scott's own pledges and contributions to Faith, a statement of the dates of solicitations made by Dr. Scott, a statement of what representations were made as to how the money raised would be spent, a statement of how much money was received or pledged in response thereto, the period of time in which the money was received, a list of people making contributions or pledges, and a statement that licensee employees would be available for interviews. Faith did not submit the requested information. Finally, by two letters, Commission staff requested Faith to make available videotapes of its "Festival of Faith" program on which solicitations of funds were made. Faith initially replied that to do so would be burdensome and expensive, but later replied that any existing tapes were the property of its sister church, Wescott. These facts formed the basis of issue (a).

5. Issue (b) relates to a letter by the Commission[5] to Faith rejecting Faith's constitutional arguments and requesting the licensee to submit the information previously requested with some modifications.[6] Faith failed to submit all of the information requested, including the cash receipts and disbursement journals, specific evidence that expenditures for the various projects were ever made, and a list of pledges and contributions of Dr. Scott.

6. Issue (c) arises from allegations received by the Commission in August 1977 concerning Faith's fundraising

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[5]By direction of the full Commission. FCC 78-434, released June 15, 1978, 69 FCC 2d 1123 (1978).

[6]At this point the Commission no longer requested Faith to submit the names of all persons pledging or contributing funds.

practices. These allegations were that Faith had raised money for specific projects which were never carried out. The allegations concerned fundraising appeals for audio equipment, studio lights, roof repairs, and a "fountain of faith". It was also alleged that Dr. Scott had used money raised through over the air fund solicitation for his own use by giving it to other organizations, primarily Wescott and the Sunset Mausoleum, in which he had interests, and that fundraising appeals were accompanied by false statements that Dr. Scott contributed his own funds and that he received only $1.00 a year from the church.

7. Two aspects of the procedural history of this case are central to the matters now before the Commission. These are Faith's response to the Broadcast Bureau's discovery attempts and Faith's request for distress sale relief. At a prehearing conference on December 13, 1978, the presiding judge Daniel Head set a hearing date of March 20, 1979 and directed Faith to respond by January 15, 1979, to interrogatories and a motion for the production of documents filed December 8, 1978 by the Broadcast Bureau.[7]

8. These dates were modified at a second prehearing conference, January 19, 1979, the hearing date extended to June 26, 1979, and the response date extended to February 1, 1979.[8] Moreover, the presiding judge noted that on January 10, 1979 Faith had declared in a letter that it was considering the possibility of a distress sale. The letter stated that Faith would inform the ALJ of its distress sale election by February 27, 1979.[9] The ALJ indicated that time was

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[7]FCC 78M-1896, released December 20, 1978.

[8]FCC 79M-123, released January 24, 1979.

[9]Faith represented in the letter: "Assuming that the hearing is not continued on other grounds . . . or that a request for such continuance is not pending, the licensee will undertake to advise the Commission on or before February 27, 1979, whether it intends to seek out a minority purchaser."

being extended to June 26 as an accommodation to Faith and that if Faith waited until May or June to seek distress sale relief he would take into account the time extended in assessing any such request.[10]

9. Thereafter, on February 1, 1979 Faith responded to the Bureau's discovery requests, but the Bureau found these responses inadequate in several respects and filed a motion to compel on March 2, 1979. The ALJ granted the Bureau's motion insofar as it sought information concerning the amounts of money donated that were actually dedicated or extended for the projects for which they were donated and the dates of such expenditures. He also found that Faith had not provided information about the amounts of funds spent for Dr. Scott's personal use or the dates of such expenditures. Finally, the ALJ found that Faith had refused to answer interrogatories on constitutional grounds which had been rejected at the prehearing conference.[11]

10. Faith sought to appeal the ALJ's orders to the Commission, but the ALJ declined to grant Faith leave to appeal.[12] Faith also filed an appeal and requested a stay before the Court of Appeals. There Faith argued that in the absence of properly filed charges, the Bureau's discovery requests constitute an unreasonable search and seizure in violation of the Fourth Amendment. It argued further that the requests violated the Church's First Amendment rights and would

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[10]See Tr. 86. Faith's statements of its intentions at this point and the presiding judge's directives are disputed. *See* paras. 75 *et seq., infra.*

[11]FCC 79M-456, released April 9, 1979, FCC 79M-470, released April 11, 1979.

[12]FCC 79M-584, released May 11, 1979. In so doing the ALJ concluded that the appeal of the discovery requests did not present any new or novel question of law that would require remand and that since Faith's right to press its constitutional claims is retained, it did not seem likely that a remand would be required even if there were errors in the discovery requests.

result in an unwarranted entanglement by the Commission in church activities and affairs. On July 13, 1979, the Court summarily dismissed Faith's appeal and denied the stay motion.[13]

11. While the appeal was pending before the Court of Appeals, Judge Head withdrew from the case and was replaced by ALJ Edward Luton, and the hearing date was continued indefinitely. Throughout these events, Faith made no further mention of any intention to have a distress sale.

12. Within a week of the court's decision, on July 18, 1979, Faith filed further responses to the Broadcast Bureau's first round of discovery. The Bureau again found the responses inadequate and filed a motion to compel. On August 6, 1979, Judge Luton found that Faith's responses were inadequate and ordered additional responses to August 17, 1979. (Generally, the interrogatories in question sought information about the amount of funds collected as a result of Faith's solicitations, the amount actually dedicated to the projects for which the money was solicited, the amount of contributions turned over to Wescott Christian Center Church, and the extent to which Dr. Scott honored pledges of his own funds.) The ALJ also scheduled commencement of the evidentiary hearing for November 27, 1979.[14]

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[13]Order, No. 79-1478 (D.C. Cir. July 13, 1979). The presiding judge denied Faith's request for a stay *Pendente lite*. FCC 79M-778, released July 6, 1979.

[14]FCC 79M-901, released August 6, 1979; FCC 79M-916, released August 8, 1979; FCC 79M-943, released August 15, 1979. In the August 6, 1979 Order the Judge ordered that Faith submit full and complete responses to the inquiries about: (1) how much of the money raised for each particular project or cause was dedicated for or expended for such project and the date of such expenditures; (2) were any of the funds raised transferred to, given to, committed to, or in any other manner turned over to the Wescott Christian Center Church? If so, set forth the purpose for each such transaction and the date and amount of funds involved in each such transaction; (3) state what representations were made by Dr. Scott in each instance of a solicitation as to a pledge of

(footnote continued on following page)

13. On July 30, 1979 the Bureau filed a motion to dismiss Faith's renewal application because of Faith's repeated failure to comply with discovery Orders.

14. On August 17, 1979 Faith filed responses to the Bureau's interrogatories as mandated by the ALJ. However, the Bureau still found Faith responses inadequate and so indicated on August 22, 1979, in a request for ruling on its previous motion to dismiss.[15]

15. On October 1, 1979, the Bureau filed its second set of interrogatories and a motion for production of documents. Generally described, these interrogatories sought information about the identity of programs during which solicitations were made, financial records concerning fundraising projects, funds used for specific projects, segregation of solicited funds from other funds, financial records pertaining to Faith in Wescott's possession, the identity and responsibilities of the officers and directors of Faith, the existence and location of "Festival of Faith" program tapes and the expenses and contributions of Dr. Scott. Faith objected to all of the interrogatories as unduly burdensome both in terms of quantity and timeliness, all of the interrogatories as defective in form, all of the document production as premature,

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his own funds; (4) set forth the date of each such representation, the amount pledged and the project or cause for which the money was pledged; (5) state the statuts of each pledge identified, including dates of satisfaction and amounts, pledges withdrawn and pledges presently outstanding and the amounts of the balances; and (6) state in detail how monies received as a result of each of the pledges was expended. Additionally, he ordered that Faith produce videotapes of Dr. Scott's program "Festival of Faith" during the period September 1976 through and including November 1976. (These latter items had been called for in three Memoranda Opinion and Order, released April 11, May 11 and July 6, 1979).

[15]While the presiding judge did not order further discovery in response to the Broadcast Bureau's first round of interrogatories and document requests he indicated in later orders that he was still not fully satisfied with Faith's responses. FCC 79M-1466, December 4, 1979; FCC 80M-459, released March 11, 1980.

certain interrogatories as irrelevant and not calculated to lead to the discovery of admissible evidence, two interrogatories on the grounds the information sought could have been requested long ago and one interrogatory as constituting an abuse of the discovery process.

16. On October 30, 1979 Faith sought a continuance to negotiate a distress sale, an election it had previously undertaken to make by February 27, 1979.[16] The ALJ denied the continuance on November 13 because of Faith's failure to pursue distress sale relief earlier in the proceeding as it had indicated it would. Since considerable Commission resources had already been expended and, since the hearing was imminent, the ALJ deemed Faith's motion untimely, indicating that the Commission's distress sale policy did not contemplate an "on again off again approach."[17]

17. On December 4, 1979, the ALJ rejected Faith's objection to the Bureau's second set of interrogatories and document requests and directed Faith to respond within two weeks.[18] In his Order the ALJ observed that Faith had failed to comply with previous discovery orders and warned that if Faith failed to comply strictly with the present order, he would seriously consider granting the Bureau's motion to dismiss Faith's application. With respect to the Bureau's second set of interrogatories, the ALJ noted that Faith had not answered a single interrogatory and that Faith's objections consisted largely of generalized complaints.

18. On December 13 Faith filed an appeal of the ALJ's Order and asked the Commission to stay the deadline for Faith's discovery response pending disposition of the appeal. On December 18, Faith filed additional responses to

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[16]*See* note 9, *supra*.

[17]FCC 79M-1346, released November 13, 1979.

[18]FCC 79M-1466, released December 4, 1979.

the Bureau's second set of interrogatories. On December 28, the Commission, by FCC 79-875, denied Faith's stay motion on the grounds that Faith had not shown that it would be irreparably harmed if the stay were denied.

19. On January 14, 1980, Faith again notified the ALJ of its election to pursue a distress sale and requested a continuance on this basis. On January 17, the ALJ ordered Faith to supplement its responses to the Bureau's third set of interrogatories, served on November 26, 1979 and initially responded to December 10, 1979, by February 1, 1980. Faith filed a response by that date, and on February 7 the ALJ set the hearing for April 1, 1980.

20. On February 29 Faith filed a petition for special relief proposing a distress sale not only of KHOF-TV but also of co-owned stations KVOF-TV San Francisco, California, and WHCT-TV Hartford, Connecticut, to subsidiaries of The East Los Angeles Community Union (TELACU), a hispanic controlled organization. The presiding judge refused to hold the proceedings in abeyance because he concluded that the distress sale request was untimely and because of the imminence of the hearing.[19] He further indicated that Faith had had "plenty of time to pursue the distress sale long ago" and "made an apparent election not to do so."

21. The presiding judge then dismissed Faith's renewal application for failure to prosecute and terminated the proceeding. In so doing the ALJ reviewed the course of the discovery proceedings and found a pattern of inadequate "piecemeal, partial and minimal" discovery on Faith's part. This had occurred, concluded the ALJ, notwithstanding

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[19]FCC 80M-426, released March 12, 1980. A motion filed by TELACU on March 13, 1980 also asking that the proceedings be held in abeyance has not been acted on.

numerous discovery orders mandating strict compliance and granting several extensions of time. An examination of several of Faith's responses to interrogatories convinced the ALJ that Faith's answers were contrived to avoid full and candid disclosure to the Commission, and represented a studied effort to avoid producing any information which could be at all harmful to its case. In view of this bad faith, and Faith's failure to comply strictly with the latest discovery order, the ALJ concluded that Faith's renewal application should be dismissed with prejudice and the proceedings terminated.

22. Faith's appeal alleges several grounds for reversal of the ALJ's dismissal. These are in the order we shall consider them: (1) the designation order and bill of particulars below did not comply with §309(e) of the Communications Act; (2) the designation of issues (a) and (b) violated the "Wiley Guidelines"; (3) the solicitations at issue are protected from government scrutiny by the First Amendment and Faith was entitled to a ruling on all of its constitutional claims during discovery; (4) Faith substantially complied with discovery; (5) the Broadcast Bureau's conduct denied Faith due process; and (6) the dismissal abrogated the Commission's distress sale policy. TELACU's appeal makes essentially the same arguments as Faith does with respect to the Commission's distress sale policy. For the reasons discussed below, we believe that none of the grounds advanced warrant reversal of the ALJ's dismissal of Faith's application for failure to prosecute its application during the discovery phase of this proceeding, and that its request or distress sale relief for station KHOF-TV should be denied.

II. Designation Order and Bill of Particulars

23. Faith claims that the designation order and bill of particulars in this case do not comply with the notice requirements of §309(e) of the Communications Act.[20] Noting that the statute requires the Commission to notify the applicant for renewal "specifying with particularity the matters and things in issue," Faith alleges that the bill of particulars here is defective in two respects. First, Faith charges that the bill omits reference to materials favorable to Faith submitted by it to the Commission during the informal predesignation process. Because the bill of particulars does not discuss all information purportedly before the Commission, Faith alleges that the bill impermissibly broadens rather than narrows the issues, citing the designation Order in *Patrick Henry*, BC Docket No. 78-332.[21] As a related matter, Faith claims that defects in the bill of particulars were compounded during discovery because the ALJ restricted Faith's attempts to acquire from the Broadcast Bureau information underlying the allegations against Faith. Second, Faith maintains that the bill fails to state allegations sufficient to charge a violation of 18 U.S.C. §1343. According to Faith, the bill fails to state the nature of the alleged misrepresentations, that the purpose of the alleged scheme was to defraud, and the precise factual questions requiring resolution. Faith also claims that evidence submitted by Faith during discovery establishes that the charges against it are untrue.

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[20] "[The Commission] shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant . . . of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally." §309(e) of the Communications Act of 1934 as amended, 47 U.S.C. §309(e) (1977).

[21] FCC 78-718, released November 3, 1978, 43 Fed. Reg. 52054 (November 8, 1978).

In particular, asserts Faith, depositions by Paul Diederich and Joseph Baumgartner, whose allegations form the basis of issue (c), retreated from these allegations during the course of deposition testimony and that other documentation further undercuts their original allegations. Faith also suggests that rather than designating Faith's license for hearing, the Commission should have referred the case to the Justice Department for possible criminal prosecution.

24. The Broadcast Bureau replies that the alleged defects in the bill of particulars are irrelevant to Faith's appeal of the dismissal of its renewal application and that there is no necessity for the bill to consider all predesignation materials. In any event, the Bureau submits, by failing to disclose pertinent information to the Commission, Faith also has raised a substantial question about its qualifications which the Commission is obligated to consider. The Bureau asserts that the bill of particulars alleges facts constituting a violation of the fraud statute with sufficient particularity.

25. Aside from the fact that it is unclear how Faith's arguments concerning the bill of particulars relate to the ALJ's dismissal of its application, we do not believe that Bureau's failure to discuss Faith's allegedly exculpatory materials in the bill of particulars deprives Faith of notice. A bill of particulars serves to inform the accused of the misconduct alleged so that the accused has an adequate opportunity to prepare a defense.[22] By informing Faith of the allegedly incriminating facts known to the Bureau, the bill of particulars has accomplished this function. Faith's arguments concerning the informally submitted material,

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[22] *See e.g., United States v. Sklaroff*, 323 F.Supp. 296 (S.D. Fla. 1971) and cases therein; *United States v. Mangiaracina*, 10 F.R.D. 415 (W.D. Mo. 1950) and cases cited therein; *Wetmore v. Goodwin Film and Camera Company*, 226 F. 352 (D.N.J. 1915); *KFPW Broadcasting Company*, 33 FCC 2d 311 (1972).

therefore, do not raise a question of notice — particularly since the information and documents to which it refers are within its possession[23] — but rather the question of whether the issues are overbroad and should be reconsidered. We consider this argument premature.[24] At hearing Faith would have the right to submit all relevant, competent and material evidence in its defense. The Commission would then decide the merits as to each issue. We believe the formal hearing would be the most desirable context for considering these matters.[25]

26. We find that the bill of particulars does state allegations with sufficient clarity. We do not believe the notice provisions of the Communications Act require the Commission to conform to the technical rules of pleading applicable to judicial proceedings.[26] Rather, the Commission

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[23]Faith has not submitted the materials which it argues should have been considered prior to designation to the Commission; as a result, they are not part of the record before us.

[24]*Cf. United States v. Calandra*, 414 U.S. 338 (1974) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on inadequate or incompetent evidence.) In general, the Commission does not entertain petitions for reconsideration of a designation Order. Section 1.106(a)(1) of the Commission's Rules. Where it appears there is no genuine issue of material fact for hearing, a party may move for summary decision. Section 1.251 of the Commission's Rules.

[25]We do not read *Hickman v. Taylor*, 329 U.S. 495 (1947) or *United States v. Proctor and Gamble Company*, 356 U.S. 677 (1958) as requiring prehearing procedures such as Faith suggests. Those cases mandate full development of the relevant facts in anticipation of the formal trial.

[26]*Philco Corporation (Philco) v. FCC*, 293 F. 2d 864 (D.C. Cir. 1961); *Deep South Broadcasting Company v. FCC*, 293 F. 2d 264 (D.C. Cir. 1960); *Allen C. Bigham, Jr.*, 5 FCC 2d 220 (1966). Faith correctly observes that the Commission had a more thorough discussion of the evidence in the designation order in *Patrick Henry, supra*. That case, which involved reconsideration of a grant of license renewal following remand from the Court of Appeals and other extraordinary features, presented circumstances which in our view merited the type of discussion we gave them. The Commission has discretion in fashioning its orders provided that basic rights are observed. *FCC v. WJR*, 337 U.S. 265 (1949).

need only state a fact situation which, if established at hearing, would tend to show that grant of a license would contravene the public interest, convenience, and necessity. We conclude that paragraph 5 of the bill of particulars meets this requirement and furthermore that the facts alleged, if proved, would constitute a scheme or artifice to defraud.

5. In August 1977 the Commission received allegations that beginning in 1976 Dr. Gene Scott, pastor-president of Faith Center, began broadcasting fund-raising appeals on Television Station KHOF-TV for church projects which never came about and for specific purposes that were promised and not carried through. The allegations concerning fund-raising for audio equipment, studio lights, roof repairs, and a fountain of faith. The Commission also received allegations that Dr. Scott was using some of the money raised through over-the-air appeals for his own personal use by giving it to other organizations in which he had an interest. The Commission also received allegations that fund-raising appeals by Dr. Scott were sometimes accompanied by statements that he had pledged money and that he received only $1.00 per year in compensation from the church when, in fact, he failed to pay the alleged pledge and the church provided him with a $185,000 house rent free and a hotel suite in Pasadena, California costing $2,000-$3,000 per month. Since the Commission has not been permitted to examine television Station KHOF-TV's financial documents and other information in order to determine the truth of these allegations, the Commission cannot determine whether fund-raising broadcasts on Station KHOF-TV violated or presently violate, Title 18, U.S.C., Section 1343.

27. The allegations in paragraph 5 charge Dr. Scott with falsely stating that (1) funds solicited would be used for specific projects, (2) Dr. Scott contributed his own funds to Faith, and (3) Dr. Scott received only $1 a year from Faith. If such false statements were in fact made with fraudulent intent and viewers were thereby induced to part with their money, a scheme to defraud would be shown. A scheme to defraud is a broad concept not limited to narrow types of misrepresentations but comprising any scheme reasonably calculated to deceive persons of ordinary prudence and comprehension and includes misrepresentations of existing fact and future promises.[27]

28. In support of its position that the allegation of wire fraud must be made with greater specificity, Faith relies principally on *Burkett v. United States*.[28] Burkett, a civil service employee was fired for making malicious statements about his supervisor — specifically, of reporting an alleged security violation concerning his supervisor. The court held that the notice of charges issued against Burkett did not provide adequate notice in five respects: (1) it did not detail the contents of the statements Burkett made, (2) it did not specify to whom the statements were made, (3) it did not specify why Burkett's statements were deemed malicious, (4) it did not specify the nature of the harm Burkett intended to inflict, and (5) it contained irrelevant and potentially misleading statements.

29. A comparison of *Burkett* with the facts before us indicate that *Burkett* does not signal any defect in the bill of particulars here. Initially we note that procedures in-

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[27]*See e.g., Durland v. United States*, 161 U.S. 306 (1969); *United States v. McNeive*, 536 F. 2d 1245 (8th Cir. 1976); *Burns v. Paddock*, 504 F. 2d 18 (7th Cir. 1974); *Gusow v. United States*, 347 F. 2d 755 (10th Cir. 1965).

[28]403 F.2d 1002 (Ct. Cl. 1968) (hereinafter *Burkett*).

volved in *Burkett* are significantly different from those used by the Commission. In *Burkett* the single notice of charges fulfilled several functions: a complaint, a bill of particulars and discovery. Commission procedures, by contrast, not only provide for separate discovery proceedings but also for procedures that afford additional protection against unfair surprise even after the commencement of the hearing.[29] Moreover, the notice of charges in *Burkett* had to comply with an Army regulation which specifically stated that a notice of charges could not be subsequently amplified and could not rely "upon the presumption, even though warranted, that the employee will readily understand the basis for the proposed action."[30] This provision significantly restricts the normal assumptions concerning the adequacy of notice.[31] In ruling that the description of the alleged malicious statements lacked specificity, the court not only relied on the restrictive Army regulation but also on the principle

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[29]Even after the conclusion of discovery, the presiding judge has the discretionary authority to fashion appropriate safeguards. *Brahy v. FRC*, 59 F. 2d 879 (D.C. Cir. 1932); *Chronicle Broadcasting Company*, 20 FCC 2d 33 (1969); *D & E Broadcasting, Inc.*, 1 FCC 2d 78, 80-1 (1965); *Belk Broadcasting Company of Florida, Inc.*, 27 FCC 2d 921 (Rev. Bd. 1971).

[30]402 F. 2d at 1004.

[31]Normally an agency need not follow the technical rules of pleading but need only apprise the accused of the nature of the allegations with sufficient particularity to allow the accused a reasonable opportunity to prepare a defense. *Morgan v. United States*, 304 U.S. 1 (1938). Consequently, the circumstances of each case, including the difficulty of ascertaining the facts necessary to formulate a defense and the opportunity to learn the pertinent facts outside of the government's formal charges assumes paramount importance. *Sunstrand Corporation v. Standard Kollsman Industries, Inc.*, 488 F. 2d 807 (7th Cir. 1973); *Money v. Anderson*, 208 F. 2d 34 (D.C. Cir. 1953). Generally, lack of notice will not be found where the accused has not been misled, surprised, or has not otherwise suffered detriment. *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971); *Cella v. United States*, 208 F. 2d 783 (7th Cir. 1953); *Hadigian v. Board of Governors, Federal Reserve System*, 463 F.Supp. 437 (D.D.C. 1978).

that Burkett was accused of defamation, which traditionally merits a highly precise description of the alleged defamatory statements. Wire fraud, on the other hand, as we have previously mentioned, is a broad offense. Moreover, unlike Burkett's alleged offense, which required a separate allegation of malicious intent, the necessary intent can be inferred from the nature of the facts comprising an alleged scheme of wire fraud.[32] Similarly, whereas the nature of the harm inflicted on Burkett's superior was speculative, the harm resulting from the alleged wire fraud here—the acquisition of money—is self evident. Finally, the bill of particulars here unlike Burkett's defective notice of charges, does not contain misleading, irrelevant matter.

30. Having discounted the applicability of *Burkett*, we turn to the truly fundamental consideration here. We see no danger that Faith will be prejudiced by any lack of specificity in the bill of particular. Faith has already learned the identity of the informants whose allegations form the basis for issue (c) and has had the opportunity to depose these individuals. If further clarification were necessary, Commission procedures discussed above would provide ample opportunity to prevent Faith from being surprised or misled.[33] Moreover, while arguing that the charges against it have not been stated with sufficient particularity, Faith inconsistently argues that it can readily rebut these charges. In any event, we expect that the financial records and videotapes available to Faith, in addition to what Faith has learned from deposing the Broadcast Bureau's informants and may learn from its employees, will apprise Faith of the necessary factual back-

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[32]*Gusow v. United States, supra.*

[33]*See* n. 29, *supra.*

ground.[34] Having discounted the possibility of prejudice to Faith we deem it irrelevant that Faith maintains its ability to demonstrate that the charges are groundless. This would be a question of fact for the hearing.

31. In particular we do not believe Faith has been prejudiced by the presiding judge's discovery Order FCC 80M-378, released March 6, 1980 which Faith alleges deprives it of the opportunity to amplify the bill of particulars. That Order declined to compel the Broadcast Bureau to answer 18 interrogatories served by Faith on November 26, 1979. In most respects we agree with the presiding judge that the interrogatories are improper. Several of the interrogatories are irrelevant. Interrogatory 8(a), for instance, asks when and how the Broadcast Bureau first learned videotapes were the property of Wescott. The Broadcast Bureau's investigative competence is not at issue here. For the same reason, Interrogatory 8(c) which asks what steps the Bureau took to secure the tapes directly from Wescott, interrogatory 12 which asks why the Bureau failed to attempt to secure the tapes directly from Westcott, interrogatory 17(b), which asks what efforts the Bureau made to determine whether its informants were biased, and interrogatory 18(a), which asks whether certain Commission personnel were shown copies of depositons, are irrelevant. Three other interrogatories are improper because they seek privileged information. Interrogatory 7(b) and (c) seeks the contents of statements obtained by the Bureau from its informants in anticipation of hearing. Interrogatory 18(b) seeks the contents of internal communications by Bureau investigators Rosenberg and Lyddane. To the extent interrogatory 18(b) seeks the views of Bureau investigators Rosenberg and Lyddane generally,

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[34]The instant case resembles *Cella v. United States, supra*, in which the nature of the alleged misconduct was clear but the government could not describe the precise occasions on which the misconduct occurred. As the defendant was not surprised or misled by the omission of these specifics no defect of notice was found.

we believe the Bureau has previously provided adequate information in its response to Faith's first interrogatories. We also believe the Bureau has adequately answered interrogatories 8(d) and 11 which inquire as to information concerning the contents of the videotapes sought by the Bureau. The Bureau has stated that it does not know the contents of the videotapes in question.

32. Most of the remaining interrogatories raise the question of the extent to which a licensee may seek the opinions of the Broadcast Bureau by interrogatory in order to clarify the issues. The Bureau's position seems in essence to be that all such inquiries are prohibited by Section 1.311(b)(4) of the Rules.[35] While the Bureau's position in this regard may be overdrawn, we need not reach this question. Even if the liberal discovery rules used in the federal courts were applicable here, the vast majority of Faith's interrogatories would still be improper.[36] Because discovery may not be used as a stratagem to maneuver an opponent into a disadvantageous position, interrogatories may not be used to require a party to furnish its opponent with a refutation of its own claims, particularly where that information is more readily available to the inquiring party.[37] Thus, interrogatory 5, asking for facts and information indicating that specific projects were carried out, interrogatory 7(b), asking for facts

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[35]Section 1.311(b)(4) states: "Commission personnel may be questioned generally by written interrogatories regarding the existence, description, nature, custody, condition and location of relevant documents and things and regarding the identity and location of persons having knowledge of relevant facts, and may otherwise only be examined regarding facts of the case as to which they have direct personal knowledge."

[36]The Commission's discovery procedures derive in part from the Federal Rules of Civil Procedure, *Discovery Procedures*, 11 FCC 2d 185, 186 (1968).

[37]*See United States v. Renault, Inc.*, 27 F.R.D. 23 (S.D.N.Y. 1960) *See also Aktiebolaget Vargos v. Clark*, 8 F.R.D. 635 (D.D.C. 1949).

and information indicating that Dr. Scott did not represent his remuneration to be $1.00 a year, interrogatory 13(b), asking for information provided by Faith favorable to Faith, interrogatory 14, asking for other information without limitation favorable to Faith, and interrogatory 17(a), asking for all information tending to show that Bureau informants are biased, are improper. Moreover, interrogatories become unjustified when they ask for an excessive amount of legal argumentation including characterization of the evidence.[38] On these grounds we reject Faith's interrogatories 4(a) and (b), which ask the Bureau to construe the wire fraud statute, interrogatories 10(a) and (b), which ask why the taking of certain depositions are essential to the determination of the issues, interrogatory 7(a), which asks whether Faith may rely on the issues being limited to certain factual questions,[39] interrogatory 8(b), which asks for all facts and information tending to show that Wescott may not freely dispose of its property, interrogatory 8(e), which asks for facts and information tending to show Faith is required to have custody of the videotapes, interrogatory 13(a), which asks for all facts and information provided by the licensee tending to be incriminatory, interrogatory 15, which asks for all facts

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[38]*See e.g., Harlem River Consumers Cooperative Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459 (S.D.N.Y. 1974); *Reichert v. United States*, 51 F.R.D. 500 (N.D. Cal. 1970); *Zinsky v. New York Central Railroad Company*, 36 F.R.D. 680 (N.D. Ohio 1964); *United States v. Renault, Inc., supra*; *Payer, Hewitt & Co. v. Bellanca Corporation*, 26 F.R.D. 219 (D. Dela. 1960); *United States v. Maryland and Virginia Milk Producers Association*, 22 F.R.D. 300 (D.D.C. 1958).

[39]We do not believe the public interest would be served by restricting the evidence introduced at hearing to contentions previously advanced by the Bureau. The public interest is best served by the fullest possible development of the issues. As previously noted, however, the licensee is entitled to protection against undue surprise. *Cf. Pressley v. Boehlke*, 33 F.R.D. 316 (W.D.N.C. 1963); *McElroy v. United Airlines*, 21 F.R.D. 100 (W.D. Mo. 1957). (Applying an analogous rule in civil litigation).

and information tending to show Faith did not assert its objections to the investigation in good faith, and interrogatories 16(b), (c), and (d), which asks for all facts information tending to show that a licensee may rely on the "Blume letter"[40] and not cooperate with a Commission investigation involving a potential criminal violation. In addition, although they are not entirely clear, interrogatories 6(a) and (c) appear to seek a legal exposition on the definition of what constitutes a "designated project" for which funds were solicited and what constitutes Dr. Scott's "personal gain."

33. The Commission would be inclined to grant Faith's motion to compel with respect to interrogatories 1-3 and 6(b), provided these interrogatories were narrowly construed. We would also compel the Bureau to answer, in response to interrogatory 16(a), whether Faith employees were ever advised that pursuant to the "Blume letter" they need not cooperate with Commission investigators and that Faith would not be penalized for their failure to cooperate. The Bureau would also be compelled to answer interrogatories 9(a), (b) and (c), inquiring as to procedures followed in attempting to subpoena Faith's employees to obtain their deposition. While these are not relevant to any existing issue, they do appear to be relevant to the emerging question of whether Faith advised its employees to avoid service of the subpoena. In any event, however, in view of the fact that we will affirm the dismissal of Faith's renewal application, these questions are now moot. There is, of course, no point in the Bureau's now answering these interrogatories and no prejudice has accrued from its previous failure to answer. We considered these interrogatories in detail, how-

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[40]The "Blume letter" described procedures followed by Commission investigatory personnel. *See, infra*, para. 34 *et seq.*

ever, to satisfy ourselves that the Bureau's failure to answer them neither constituted a deprivation of due process to Faith nor provoked the obstructive behavior which prompted the dismissal of Faith's application.

III. The "Blume Letter"

34. Faith asserts that the Commission's designation of issues (a) and (b) is contrary to the so-called "Wiley Guidelines" or "Blume Letter", a letter dated March 20, 1975, from then Chairman Wiley to Jack P. Blume, then president of the Federal Communications Bar Association. According to Faith, Commission staff presented this letter to Faith at the time of investigation and, therefore, the Commission is bound by its terms. Faith cites language in the letter stating that the Commission does "not penalize a licensee for failure to cooperate in an investigation." Faith maintains that issues (a) and (b), which relate respectively to Faith's alleged refusal to allow Commission investigators access to its books and records and to submit materials requested in the Commission's June 15, 1978 by direction letter, are inconsistent with this representation.

35. The Broadcast Bureau replies that Faith's interpretation of the Blume letter is erroneous. In the Bureau's view the quoted language relied on by Faith relates only to the effect of noncooperation on determining the amount of any forfeiture assessed against a licensee. The Bureau rejects the claim that the Blume letter precludes the Commission from designating an issue against a licensee for failing to cooperate with a Commission investigation, contending that this interpretation of the letter would "literally preclude the Commission from carrying out regulatory responsibilities . . ." and permit the licensee to "terminate an investigation by stonewalling Commission investigators . . . ." Moreover, the Bureau notes that the designation of Faith's application for hearing was preceded by the Commission's June 15, 1978 by direction letter, which rejected Faith's

constitutional arguments and advised Faith that failure to submit the requested information would result in designation for hearing. Thus, argues the Bureau, Faith had notice that it could not rely on the Blume letter in this regard.

36. In our view Faith has misconstrued the effect of the Blume letter which, as was the case with Faith's notice argument, does not directly bear on the dismissal of Faith's application. As the Blume letter states on its face, it merely reports the results of an informal review by Former Chairman Wiley of procedures followed by Commission investigators. The letter is not a Commission rule or regulation, was not intended to have the force and effect of law and, therefore, cannot in any way bind the Commission.[41] The Commission's policies applicable to this proceeding were amply set forth in our letter to Faith of June 15, 1978. There we rejected Faith s objections to producing the requested information, concluded that Faith had no justification for withholding information from Commission investigators, and indicated that failure to comply could result in designation for hearing. We certainly did not recognize any "privilege" against cooperation with Commission investigators or right to demand a formal §403 investigation. In

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[41] *See Brennan v. Ace Hardware Corporation*, 495 F. 2d 368 (8th Cir. 1974); *Hawkins v. State Agriculture Stabilization an Conservation Committee*, 149 F.Supp. 681 (S.D. Tex. 1957). Moreover, even if Broadcast Bureau personnel had erroneously stated that Faith could rely on the Blume letter in withholding information, such representations would not foreclose our inquiry. The government is not estopped by the unauthorized representations of its agents. *See, e.g. Leimbach v. Califano*, 596 F. 2d 300 (8th Cir. 1976) *cert. denied*, 431 U.S 937 (1977); *Thanet Corporation v. United States*, 591 F. 2d 629 (Ct. Cl. 1979). On the other hand, any representations made by the Broadcast Bureau in conjunction with the Blume letter would be relevant to an evaluation of Faith's motives. But, as we previously stated, any reliance by Faith would be inconsistent with our June 15, 1978 by direction letter.

any event, whatever significance the Wiley letter might have had prior to the issuance of the June 15, 1978 letter, this was superseded by the June 15 letter.[42]

37. Moreover, Faith's attempted Construction of the Blume letter is clearly unreasonable. Unresponsiveness to Commission inquiries may reflect lack of candor or misrepresentation indicating that a licensee is unfit.[43] For this reason, any purported policy barring inquiry into failure to cooperate with Commission investigators or other Commission inquiries would be incompatible with our obligations under the Communications Act. The Act requires us to make a finding that the public interest, convenience, and necessity would be served thereby before granting any renewal application.[44] Where such a finding cannot be made the application must be designated for hearing.[45] It would be inconsistent with these responsibilities to close our eyes to the possibility that a licensee's noncooperation with Commission investigators stemmed from character deficiencies

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[42]As Faith notes, the Commission did say in the June 15 letter: "The Commission recognizes that [Faith's] objections are advanced in good faith and in the licensee's sincere belief in their validity." As described below, however, subsequent events have proven that statement overly generous.

[43]*See, e.g., FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Wadeco, Inc. v. FCC*, Case No. 78-1913 (D.C. Cir. April 1980); *Las Vegas Valley Broadcasting Company v. FCC*, 589 F. 2d 594 (D.C. Cir. 1978); *Janus Broadcasting Company*, 47 RR 2d 805 (1980); *Vinita Broadcasting Company, Inc.*, 30 FCC 2d 458 (1971); *Nick J. Chaconas*, 28 FCC 2d 231 (1971); *Radio Broadcasters, Inc.*, 23 FCC 2d 209 (1970).

[44]Communications Act of 1934 as amended §§307-9, 47 U.S.C. §§307-9 (1977).

[45]*Id.*

undercutting the licensee's basic qualifications.[46] Certainly, the Blume letter cannot be interpreted to have this effect.

38. In any event, a close reading of paragraph 5 of the Blume letter does not support Faith's interpretation. The paragraph begins: "The cooperation of a station with an investigation is not a factor in determining the amount of a forfeiture." The question of how the amount of forfeiture is determined is unrelated to that of whether noncooperation with a Commission investigation evidences lack of candor reflecting adversely on a licensee's basic qualifications. A subsequent phrase relied on by Faith — "Although we do not penalize a licensee for failure to cooperate in an investigation" — must be construed in the context of the overall subject of the paragraph, forfeitures. Moreover, the paragraph goes on to say: ". . . we expect [a licensee] to cooperate and to be candid and open with our investigators, and we intend to issue Orders for formal 403 inquiries in those cases where a licensee's obstruction of an informal investigation makes it impossible to ascertain the facts." This language belies any possibility that obstructive behavior would not have further consequences for the licensee.

IV. Constitutional Arguments

39. Faith asserts that the solicitation of funds encompassed by issue (c) is protected by the First Amendment and that the government bears the burden of demonstrating a

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[46]That the Commission should not adopt procedures that foreclose full inquiry into public interest factors was enunciated in *Retail Store Employees Union, Local 880, Retail Clerks International Association, AFL-CIO v. FCC*, 436 F. 2d 248 (D.C. Cir. 1970). An alleged privilege against cooperation with Commission investigators would also be inconsistent with the Commission's grant of full power to conduct investigations. *See FCC v. Schreiber*, 201 F.Supp. 421 (S.D. Cal. 1962) *modified and aff'd* 329 F. 2d 517 (9th Cir. 1964) *modified* 381 U.S. 279 (1965); *Stahlman v. FCC*, 126 F.2d 124 (D.C. Cir. 1942). *See also* Communications Act of 1934 as amended §403, 47 U.S.C. §403 (1977); Section 73.1225(a) of the Rules.

compelling state interest achievable by no less intrusive means before Faith is required to divulge any information concerning these practices. Inquiry into Faith's fundraising practices would, in Faith's view, violate the free exercise clause of the First Amendment. Faith characterizes its fundraising activities as embodying a "credal belief that giving is an act of sacrifice and worship."[47] Faith considers its pastor, Dr. Scott, as God's chosen representative, to have the power to determine the application of any funds donated. Were the Commission to question the use of these funds, argues Faith, it would be unconstitutionally testing the truth or falsity of religious belief and substituting the judgment of the agency in place of the ecclesiastical hierarchy. In particular, Faith objects to any inquiry into the expense records of Faith's pastor, because the church-minister relationship is especially privileged. Faith also contends that inquiry into Faith's financial affairs violates the establishment clause of the First Amendment. Faith argues that such inquiry would create excessive entanglement of the government into church affairs.

40. In maintaining that the Commission may not require disclosure of Faith's financial affairs without demonstrating the existence of a compelling state interest achievable by no less intrusive means, Faith faults the presiding judge for not ruling on all constitutional claims prior to discovery. For this proposition, Faith relies principally on *Surinach v. Pesquera de Busquets*.[48] Faith finds the Bureau's second interrogatories, because they are broader in scope than the first interrogatories, particularly objectionable. Faith sug-

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[47]Faith elaborates on the nature of its religious beliefs in a document titled "The Theology of Giving" contained in its February 1, 1979 response to the Broadcast Bureau's interrogatories.

[48]604 F. 2d 73 (1st Cir. 1979) (hereinafter *Surinach*).

gests that criminal prosecution or a show cause proceeding represent less intrusive alternatives to the course of action followed here.

41. The Broadcast Bureau responds that Faith misstates established principles of law. According to the Bureau, Faith may not shield itself from Commission scrutiny by merging its broadcast and religious activities. Rather, argues the Bureau, Faith takes its broadcast license burdened with public interest obligations justifying Commission inquiry. Moreover, the Bureau denies that a person may, under the cloak of religion, commit frauds on the public with impunity.

42. The Commission does not accept Faith's constitutional arguments. We recognize of course that religious solicitations are protected by the First Amendment. But we strongly disagree with Faith as to the nature and extent of that protection. By attempting to characterize its fundraising activities as expressions of belief and worship, Faith disregards an axiomatic distinction in First Amendment law between freedom to believe and freedom to act.[49] While freedom to believe is absolute, conduct is subject to government regulation, although an indirect burden on religious belief may result.[50] Thus, solicitation, as a form of conduct, may be subject to government regulation of numerous types including regulation designed to prevent fraud on the public.[51] As Faith correctly points out, the First Amendment imposes definite limitations on the form such regulation may take. For example, a statement of religious belief may not be characterized as a fraudulent misrepresentation —

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[49]*Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1940).

[50]*Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Braun*, 366 U.S. 599 (1961).

[51]*Cantwell v. Connecticut, supra. See also Prince v. Massachusetts*, 321 U.S. 158 (1944).

only statements of secular fact may be so characterized.[52] In the present case, the alleged misrepresentations indeed represent statements of fact *i.e.*, the use to which solicited funds would be put, Dr. Scott's compensation, and whether Dr. Scott pledged his own funds. To the extent Faith disputes the nature of the statements actually made, Faith raises factual questions more appropriately resolved at an evidentiary hearing. The mere possibility that Faith may have a defense to the allegations does not justify obstructing the trial of these issues. Another limitation Faith correctly points out, is that regulations designed to prevent fraud may be no broader than necessary. For this reason, courts have frequently struck down licensing schemes in which the state has attempted to impose blanket prohibitions on public solicitation subject to the unrestrained discretion of public officials, or has attempted to impose overly restrictive financial constraints on solicitors.[53] Faith accurately observes that the courts have preferred that the state undertake to prosecute specific acts of fraud rather than resort to the types of licensing schemes found unconstitutional. We believe the Commission has complied with these principles. We have not imposed any prior restraint on Faith's becoming a Commission licensee; nor have we instituted indiscriminate pro-

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[52]*United States v. Ballard*, 322 U.S. 78 (1944). *Compare* 322 U.S. at 86-8 and 322 U.S. at 83-4. *Accord Church of Scientology of California v. Richardson*, 437 F. 2d 214 (9th Cir. 1971); *Founding Church of Scientology v. United States*, 409 F. 2d 1146 (D.C. Cir. 1969). *SEC v. World Radio Mission, Inc.*, 544 F. 2d 535 (1st Cir. 1976). Similarly, a church may establish property interests by ecclesiastical law. *Jones v. Wolf*, 443 U.S. 595 (1979).

[53]*Village of Schaumburg v. Citizens for a Better Environment*, 100 S.Ct. 826 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Cantwell v. Connecticut, supra*; *Lovell v. Griffin*, 303 U.S. 444 (1938); *Fernandes v. Limmer*, 465 F.Supp. 493 (N.D. Tex. 1979); *International Society for Krishna Consciousness v. Engelhardt*, 425 F.Supp. 176 (W.D. Mo. 1977).

spective examination of Faith's affairs. Rather, we have acted only in response to allegations of specific fraudulent acts, which we must examine in order to make a determination whether to renew Faith's license. As for Faith's proposed less restrictive alternatives, we see no reason to have referred this matter to the Justice Department prior to taking action on our own when the Commission has concurrent jurisdiction in this area.[54] To do so would prolong these renewal proceedings indefinitely. Nor has Faith shown why a show cause proceeding would be a desirable alternative.

43. Faith's excessive entanglement argument similarly misses the mark. The Commission does not intend any continuing entanglement in Faith's affairs.[55] As stated above, we have the narrow purpose of investigating an allegation of specific fraudulent conduct. Because our inquiry relates to a narrow and legitimate governmental interest, it is readily distinguishable from that found offensive in *Surinach*.[56] That case dealt with an order by the Puerto Rican Department of Consumer Affairs directed to Catholic Church related schools requiring them to produce extensive financial information concerning their operations. This Order was issued pursuant to the Department's mandate to restrain inflationary trends and to establish and monitor price controls on goods and services. In the court's view, the preliminary information gathering by the Department could not be severed from the Department's logical goal, the institution of cost ceilings for Catholic Schools. As the court

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[54]See *FCC v. American Broadcasting Company*, 347 U.S. 284 (1954).

[55]*Compare NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Lemon v. Kurtzman*, 403 U.S. 602 (1979) (Where government would have had continuous supervisory presence over conduct of religious schools).

[56]The presiding judge similarly distinguished *Surinach* in FCC 79M-1086, released September 17, 1979.

concluded that such ceilings would seriously interfere with the Catholic school's ability to carry out their religious mission and would entangle the state in decision making more appropriately left to the church, activities of the Department constituted a clear and present threat to the schools' First Amendment rights. Moreover, inflationary trends could have been investigated without specific inquiry into parochial schools. Our consideration of alleged fraudulent activities by a specific church-licensee bearing on that licensee's qualifications in no way resembles the government actions found objectionable in *Surinach*.[57] Furthermore, the Commission is not proposing to entangle itself into the delicate relationship between a church and its pastor.[58] Our concern with Dr. Scott's compensation and contributions arises because Dr. Scott allegedly misrepresented these over the air.

44. We also reject Faith's suggestion that its fundraising is a matter between Faith and its congregation. By conducting its fundraising by means of television, Faith has elected to occupy a forum that is not only distinctly public in character, but one of a limited number of such public forums. Faith thereby subjects itself to public interest obligations.

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[57]*Surinach* itself expressly distinguished the facts before it from a case "in which the records of a religious organization are subpoened pursuant to a criminal investigation, a situation in which the states' interest unquestionably is strong." 604 F. 2d at 80. *See also In re Rabbinical Seminary*, 450 F.Supp. 1078 (E.D.N.Y. 1978) (where the court approved the disclosure of large amounts of financial information pursuant to a grand jury investigation of a religious institution allegedly obtaining federal aid to education funds fraudulently). The type of entanglement found objectionable in *Surinach* closely resembles that disapproved in *Lemon v. Kurtzman, supra*.

[58]Compare *McClure v. Salvation Army*, 460 F. 2d 553 (5th Cir 1972) (employment discrimination law not applicable to Church-minister relationship).

> A religious group, like any other, may buy and operate a licensed radio or television station. [citation omitted]. But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.' *Office of Communications of United Church of Christ v. FCC*, 359 F. 2d 994, 1003 (1966). There are, concededly, constitutional limits on the conditions which the FCC may impose. But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.[59]

Thus, the exercise of Faith's First Amendment rights must be delicately balanced against possible injury to the public. Faith might have been able to show that its conduct on the merits, while open to question from a purely secular point of view — if indeed open to question at all — was nevertheless protected by the First Amendment.[60] As we have said, Faith would have had the opportunity to assert at the hearing that its representations, because of their relationship to Faith's religious creed, should not be considered fraudulent. However, we reiterate that the possible existence of a defense would not bar hearing the merits of the case. Indeed, such a position would raise serious constitutional problems in itself. Faith's view would tend to create a favored class of licensees immune from Commission scrutiny although questions justifying inquiry into other licensees

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[59] *King's Garden, Inc. v. FCC*, 498 F. 2d 51, 60 (D.C. Cir. 1970) *cert. denied*, 419 U.S. 996 (1974). *See generally FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969). *Cf. SEC v. World Radio Mission, Inc., supra, Muhammed Temple of Islam v. City of Shreveport, Louisiana*, 387 F.Supp. 1129 (W.D.L.A. 1974), *aff'd*, 517 F. 2d 922 (5th Cir. 1975).

[60] *Cf. Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office v. FCC*, 403 F. 2d 169 (D.C. Cir. 1968) *cert. denied*, 394 U.S. 930 (1969) (anti-semitic remarks protected).

existed. Membership in this preferred class would rest on a prior evaluation of the licensee's asserted religious creed, here "The Theology of Giving." By contrast, evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture.[61]

45. As we have concluded that Faith's general constitutional claims are groundless, we are left with the possibility that specific discovery requests are prohibited. We agree with the presiding judges below that Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm.[62] Therefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders discussed in the next section.[63] Absent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery.[64]

V. Faith's Discovery Performance

46. The presiding judge based his dismissal of Faith's renewal application on the conclusion that Faith failed to respond to Broadcast Bureau discovery requests in good

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[61]*Cf. Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

[62]*See in re Rabbinical Seminary, supra. See generally, Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[63]One particular point deserves special mention. Although individual membership records of a political or religious organization may under some circumstances, be protected from disclosure by the First Amendment, this principle cannot automatically be extended to an organization's officials and solicitors. *NAACP v. Alabama, supra*. Thus, we have sought disclosur of Dr. Scott's contribution records for the relevance to the fraud issue.

[64]*Cf. Barenblatt v. United States*, 360 U.S. 109 (1959) (contempt of congress ruling upheld over claim of freedom of association violation).

faith and thereby deliberately obstructed the proceedings. Reviewing Faith's overall discovery performance, the presiding judge held that Faith's failure to comply strictly with the December 4 discovery Order led to this result. At issue are the first two rounds of discovery initiated by the Broadcast Bureau. These consist of (1) 16 interrogatories and 5 classes of document requests served December 8, 1978 and (2) 39 interrogatories and 20 classes of documents requests served October 1, 1979. The presiding judge interpreted Faith's responses to these discovery requests as a studied effort to avoid producing documents and information harmful to its case. He accused Faith of failing to make prompt, specific, and reasonably detailed responses and of answering only in an incomplete and piecemeal fashion after securing extensions from the presiding judges. The ALJ found that these Orders remain, in large measure, unmet. Under the circumstances, and in light of Faith's perceived bad faith, the ALJ concluded that Faith had failed to prosecute its application within the meaning of the Commission's rules.[65]

47. The pertinent procedural history is as follows.[66] Faith initially responded to the Bureau's first round of discovery on February 1, 1979. Faith's incomplete response prompted the Bureau to file a motion to compel on March 2, 1979. Faith opposed the Bureau's motion, in main part,

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[65]The Broadcast Bureau served its third interrogatories comprising 17 interrogatories and the third motion for production of document comprising 5 classes of documents on November 27, 1979. On December 10, Faith objected in whole or part to 12 interrogatories and answered 5. By Order FCC 80M-96, released January 17, 1980, Judge Luton upheld Faith's objection to 7 interrogatories and ordered Faith to answer 5 others. Faith provided further answers to the five interrogatories on February 1, 1980. The ALJ did not make Faith's performance with respect to the third interrogatories a factor in dismissing its application and for that reason, absent any indication that Faith's performance mitigates its previous misconduct, we need not reach that question.

[66]*See also* para. 7 *et seq.*, *supra*.

on the grounds that the bill of particulars was defective since it did not allege a specific violation of 18 USC §1343, that the motion was an impermissible fishing expedition and that the motion violated Faith's First Amendment right of freedom of religion. The ALJ ordered Faith to make further response to interrogatories 6 and 8-16 by April 13 and to produce the requested documents at a mutually convenient time.[67] Generally, the ALJ ordered Faith to respond with information regarding how money donated was dedicated or expended for projects for which it was solicited and donated, specific information about funds spent for Dr. Scott's personal use, and noted that Faith had refused to answer interrogatories on constitutional bases which had been rejected at the prehearing conference.

48. Faith sought leave to appeal to the Commission on April 20, 1979 and filed a notice of appeal with the D.C. Circuit on May 9, 1979.

49. In its appeal to the Court of Appeals, Faith argued that in the absence of a proper charge, the Bureau's discovery requests constitute an unreasonable search and seizure in violation of the Fourth Amendment and that the Bureau's requests violate the First Amendment rights of the church and will result in an unwarranted entanglement by the Commission in church activities and affairs. The presiding judge denied Faith's request for appeal to the Commission and ordered Faith to respond to discovery.[68] On June 14 Faith moved for a stay pending Faith's judicial appeal. The ALJ denied the stay motion and ordered discovery by July 18. On July 11, Faith moved for a stay

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[67]N. 11, *supra*.
[68]N. 12, *supra*.

before the Court of Appeals. The court denied the stay and summarily dismissed the appeal on July 13, 1979.[69]

50. Within a week of the court's decision, on July 18, 1979, Faith submitted its further responses to the Broadcast Bureau's first discovery request. The ALJ, however, remained dissatisfied with Faith's responses to interrogatories 6, 10, and 13-16 those interrogatories inquiring into how funds solicited for particular causes were expended, funds turned over to Wescott, and Dr. Scott's pledges and contributions, and also noted that Faith had still failed to produce most documents requested, primarily videotapes of the "Festival of Faith" program. Setting a hearing date of October 30, 1979, the Presiding Judge ordered further responses by August 17.[70]

51. Of the responses submitted on August 17, the ALJ remained dissatisfied with the responses to interrogatories 13-16, which inquired into Dr. Scott's pledges and contributions. Moreover, videotapes requested in one of the document requests were not submitted.[71]

52. The Broadcast Bureau served its second round of discovery on October 1, 1979. Faith responded on October 24 with a pleading that did not specifically answer a single interrogatory or produce any documents. Faith was then faced with the ALJ's Order (1) directing further responses by December 18 (2) and further document production and (3) threatening dismissal.[72] The ALJ noted that Faith had not answered a single interrogatory contained in the Bureau's second request, and that its objections consisted largely of generalized complaints which did not assist ma-

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[69]N. 13, *supra*.
[70]N. 14, *supra*.
[71]*See* n. 15, *supra*.
[72]N. 18, *supra*.

terially resolution of the matters under consideration. Faith appealed to the Commission on December 13 and on the same date moved for a stay, which was denied.[73]

53. The presiding judge devotes the bulk of his dismissal order to the perceived deficiencies in Faith's December 18 responses and Faith's failure to produce the vast majority of the requested documents. He concluded that Faith's responses to interrogatories 8, 9, 11, 21-26, 32, 35, and 38 were inadequate. These interrogatories sought information about projects for which funds were solicited, donations received for specified purposes, documents in the possession of Wescott relating to Faith's finances, the existence and location of "Festival of Faith" tapes, information in possession of Wescott relating to the "Festival of Faith" program, how Wescott expended Faith monies and the basis for Faith's assertion that Wescott was concerned about government entanglement when asked to provide information. Additionally, he found that Faith's responses to interrogatories 3, 4, 8, 10-12, 15, 34, and 36 were made in bad faith. These interrogatories inquired into the identity of Faith personnel who reviewed Faith's financial records, the identity of programs during which solicitations were made, the identity of projects for which solicitations were made, whether Faith segregated broadcast solicitations from other funds, documents in the possession of Wescott relating to the finances of Faith, the identity and duties of the officers and directors of Faith, Dr. Scott's business and personal expenses, monies he received, and Dr. Scott's contribution records.

54. Faith contends that it has rendered substantial compliance during the discovery phase of these proceedings. Preliminary, Faith faults the presiding judge for suggesting

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[73]FCC 79-875, released December 28, 1979.

impropriety in Faith's judicial appeal of the first discovery Orders and requests for extension of time. Faith claims it has good cause for pursuing a judicial appeal, for seeking extensions of time, and for a stay *pendente lite*. Moreover, Faith asserts it has furnished virtually all of the information requested and was justified in withholding any information not disclosed.

55. Similarly, Faith objects to the ALJ's treatment of Faith's responses to the second round of discovery requests. Faith considers the requests for numerous financial records unduly burdensome. It also complains that the ALJ overlooked the fact that much of the information requested by the second round of interrogatories and document requests was not in Faith's possession but rather in the possession of its sister church, Wescott. Although the two churches share some common officers, Faith considers it a misapplication of agency law to attribute knowledge gained by the common officers, notably Dr. Scott, as agents of Wescott, to Faith. Additionally, Faith accuses the ALJ of derogating its *bona fide* constitutional claims regarding its religious doctrines. Faith submits that it has substantially complied with the second round of discovery.

56. The Broadcast Bureau essentially concurs with the ALJ's analysis of Faith's performance.

57. Having examined the record in this case, it is our considered view that Faith's consistent refusals to respond during the discovery phase of this proceeding so obstructed the orderly conduct of these proceedings that Faith has failed to prosecute its application. We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. Of critical significance in reaching this conclusion is Faith's continued failure to respond subsequent to the Court of Appeal's summary dismissal of its appeal on constitutional grounds on July 13, 1979. At this

point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. As a final matter, as will be explained below, we do not agree with Faith that the ALJ erred in any material way in compelling responses to the Bureau's discovery requests. Therefore, we affirm the dismissal with prejudice of Faith's application.

58. Faith's initial response to the Broadcast Bureau's first set of interrogatories gave satisfactory answers to only six of the 16 interrogatories propounded. Faith objected on constitutional grounds to four interrogatories inquiring about pledges allegedly made by Dr. Scott (No. 13-16) and to interrogatories asking what funds were transferred by Faith to Wescott (No. 10) and to Sunset Mausoleum (No. 12). Faith also attempted to justify unresponsive answers to interrogatories asking whether funds solicited were expended for Dr. Scott's personal use (No. 8), the debts and obligations existing between Faith and Wescott (No. 9), and what interest Faith had in Sunset Mausoleum (No. 11).[74]

59. The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point, in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination as to the propriety of discovery requests if indeed they were not already put on notice by our June 15, 1978 by direction letter. Nevertheless, five days after the issuance of the court's decision, Faith filed another inadequate response to the in-

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[74]In response to interrogatory 6, Faith was dilatory in supplying an adequate statement of disbursements relating to specific projects. A statement satisfactory to the ALJ was not supplied until Faith's third response to the interrogatory on August 17, 1979.

terrogatories. Faith failed to provide the information requested about the four interrogatories concerning Dr. Scott's pledges (No. 13-16).[75] Moreover, Faith did not disclose the amount of funds raised which were turned over to Wescott to be "handled on Faith's behalf" (No. 10) or provide a satisfactory statement of disbursements made for specific projects (No. 6).

60. With regard to the four questions concerning Dr. Scott's personal pledges (Nos. 13-16), the Commission fully agrees that the responses Faith gave on August 17, 1979 are especially egregious. They are patently evasive, and are the third in a series of unresponsive answers to the same interrogatories. Faith initially answers the interrogatory "State what representations were made by Dr. Scott in each instance of a solicitation as to the pledge of his own funds" with the apparently straightforward statement" "*No* 'representations were made by Dr. Scott in each instance of a solicitation to a pledge of his own funds'." Faith, however, goes on to make an offer of "expanded answers to what it thinks the interrogatories might really intend to seek as information." What the interrogatories sought as information was what they clearly stated, and Faith has no bona fide reason to attempt a distinction. Faith then takes the completely unwarranted position that the Commission's June 15, 1978 by direction letter, in which the Commission stated it would not require at that time the disclosure of all individual donor records, exempted Dr. Scott's donor records from disclosure. The distinction between Dr. Scott's records and the records of rank and file contributors has always been clear, and Faith has no basis for its contrived interpretation. Faith then begins its "expanded answer,"

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[75]Instead Faith proffered an affidavit stating that Dr. Scott had paid all pledges.

with the statement: "To the best of its knowledge, Faith can recall no instance of a solicitation in which representations were made by Dr. Scott as to a pledge of his own funds. However, at the same time solicitations were being made, along with many other respondees Dr. Scott was known to have made pledges." The "expanded answer" continues with the same kind of ambiguity and equivocation in which Faith denies that any representations were made while simultaneously describing and discussing what are apparently pertinent representations. The net effect of Faith's answer is obfuscation and a demonstration of its bad faith.

61. Through this sequence of events Faith also failed to supply an important class of documents, the master videotapes of the "Festival of Faith" program, which Faith complained were in Wescott's possession. As will be explained, we consider its rationale for this failure groundless.

62. The Commission similarly concurs in the presiding judge's criticism of Faith's responses to the second set of interrogatories. Even if some of the points in Faith's initial response to the Bureau's second set of interrogatories were valid, we can see no justification for Faith's failing to answer a single one of the 39 interrogatories and 20 document requests. While there may be some merit to Faith's complaints that it would be difficult to supply all information requested in the alloted time period, Faith need not have resorted to a blanket objection. At the very least, Faith could have specifically indicated in those instances where specific responses were not immediately feasible, and what information would require further time to compile.

63. Finally, we disagree with Faith's argument that inquiry into Faith's fundraising beyond the specific incidents mentioned in the bill of particulars is irrelevant. Even assuming, *arguendo*, that some reason exists for giving the

specific instances mentioned in the bill of particulars primary importance,[76] it would nevertheless be relevant to Faith's qualification to remain a Commission licensee to know whether the originally alleged instances of fraud were part of a pattern of conduct.

64. When Faith finally gave specific responses to the Bureau's second interrogatories, these responses, in our view, displayed serious deficiencies and bad faith. Most notable is Faith's withholding of information concerning Wescott and Dr. Scott, ostensibly on the grounds that Dr. Scott's knowledge of these matters was obtained in capacities other than as an officer of Faith. Faith bases this argument on a principle of agency law purportedly enunciated in *Ruberoid Company v. Roy*[77] to the effect that knowledge acquired by an agent while acting other than on behalf of his principal is not imputed to the principal. Faith also alleges that Dr. Scott's interests are adverse to Faith. Faith contends its interpretation is buttressed by the ALJ's ruling striking Dr. Scott as a named respondent to the second interrogatories. In Faith's opinion, the severance of Dr. Scott indicates that Dr. Scott should not be required to divulge any knowledge not acquired as Faith's agent.

65. We agree with the ALJ that this line of reasoning is a bad faith contrivance. The interrogatories were properly addressed to the corporate licensee. Although interrogatories

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[76]As indicated previously, (No. 29, *supra*) Commission procedures provide safeguards to protect the licensee from unfair surprise if new allegations are introduced.

[77]240 F.Supp. 7 (E.D. La. 1965) (hereinafter *Ruberoid*). In *Ruberoid*, employees of Ruberoid Company defrauded a second corporation. The court held that the injured corporation could not proceed against Ruberoid Company because the employees were acting in their own interest and against the interests of Ruberoid Company. The employees' adverse interest was envinced by the fact that their fraud resulted in Ruberoid Company's loss of a contract with the defrauded corporation.

could not have been directly addressed to Dr. Scott, who is a non-party,[78] this does not mean Faith could arbitrarily withhold information available to Dr. Scott, its principal. A party must disclose all information not otherwise privileged within its control or available to it.[79] A party may not unreasonably ignore information available to it from outside sources or fail to make good faith attempts to obtain such information.[80] Assuming that the principles of imputed knowledge are relevant to this question, we disagree with Faith's application of pertinent agency law. Faith argues that (1) Dr. Scott acquired the information outside the scope of his agency as president of Faith and (2) as an officer of Wescott, Dr. Scott has interest adverse to Faith *i.e.*, that of avoiding government entanglement. We find Faith's line of reasoning utterly unpersuasive. Under general principles of agency law the fact that an agent has acquired information outside the scope of his agency is irrelevant if he subsequently acts for his principal with the benefit of such information.[81] Faith does not dispute that Dr. Scott had actual

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[78]Section 1.323 of the Rules provides that interrogatories may only be addressed to parties.

[79]*See e.g., Schwimmer v. United States*, 232 F. 2d 855 (8th Cir. 1956); *Erone Corporation v. Skouras Theatres Corporation*, 22 F.R.D. 494 (S.D.N.Y. 1958); *Republic of Italy v. De Angelis*, 14 F.R.D. 519 (S.D.N.Y. 1953).

[80]*See e.g., Pilling v. General Motors Corporation*, 45 F.R.D. 366 (D. Utah 1968); *Holland American Merchants Corporation v. Rogers*, 23 F.R.D. 267 (S.D.N.Y. 1959), *Societe International pour Participation Industrielles et Commerciales, SA v. Clark*, 9 F.R.D. 263 (D.D.C. 1949).

[81]*See Mechanics Universal Joint Company v. Culhane*, 80 F. 2d 147 (7th Cir. 1935) *aff'd* 299 U.S. 51 (1936); *In re Kentucky Wagon Manufacturing Company*, 71 F. 2d 892 (6th Cir. 1932); *Pollman v. Curtice*, 255 F. 628 (8th Cir. 1919); *Claris v. Oregon Short Line Railroad Company*, 51 P.2d 217 (Idaho 1935); *John H. Giles Dyeing Machinery Company v. Klauder-Weldon Dyeing Machinery Company*, 135 N.E. 854 (N.Y. 1922); *Henry v. Omaha Packing Company*, 115 N.W. 772 (Neb. 1908).

control over the documents sought in discovery while he served as president of Faith. Faith's own answers to the Bureau's interrogatories indicate that Dr. Scott routinely inspected the requested financial records possessed by Wescott[82] and Dr. Scott himself appears to concede he exercised physical control over at least some of the videotapes in question.[83] Nor does the Commission perceive an adverse relationship between Dr. Scott and Faith. Dr. Scott serves as president of both Faith and Wescott with the concurrence of both organizations. Faith has advanced no evidence that Dr. Scott's dual agency involves deception against either corporation or a conflict of interest. Indeed, Dr. Scott remains Faith's principal spokesman. Thus, both corporations must have been aware that Dr. Scott would deal with information of relevant to both corporations and would be subject to the legal obligations and fiduciary duties appropriate in both capacities. Therefore, it does not avail Faith now to complain that this arrangement proves troublesome to the parties who voluntarily created it.[84]

66. We also reject the argument advanced by Faith concerning the burden imposed by disclosure of the requested financial records. Faith, in submitting no more than highly generalized descriptions of these financial records, relies on *United States for the Use and Benefit of Schneider, Inc. v. Rust Engineering Company*[85] for the proposition that a re-

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[82]*Further Response of Faith Center, Inc. to Interrogatories*, filed July 18, 1979 at 14-5; *Response to the Broadcast Bureau's Second Interrogatories*, filed December 18, 1979 at 20.

[83]Appendix O to *Reply*, filed July 21, 1980, by Faith at 5.

[84]*Cf. Farr v. Neuman*, 199 N.E.2d 369 (N.Y. 1964).

[85]72 F.R.D. 195 (W.D. Pa. 1976). There the defendant had provided the plaintiff with 318,000 pages of financial records, which defendant had indexed. What the court rejected was the plaintiff's request that each of the 318,000 pages be numbered for identification with respect to references in accompanying interrogatories. The court found it more reasonable, in light of the burden on the defendant and the absence of any objection to the sufficiency of specific responses to the interrogatories, for the plaintiff to perform the numbering itself during the course of examining the documents.

sponse to a broadly framed interrogatory need only reflect the broadness of the interrogatory. However valid that proposition may be generally Faith's responses here are unjustifiably unresponsive. Similarly Faith relies on *In re U.S. Financial Securities Litigation*[86] for the proposition that unduly burdensome interrogatories should be stricken. Again, however, the facts simply do not bring this case within the sweep of that rule.

67. We find the ALJ wholly justified in condemning Faith's specific responses to the Bureau's second interrogatories. Several interrogatories call for Faith to identify specific financial records on which its responses are based. However, Faith fails to identify any relevant documents in its response to these interrogatories although the Bureau's interrogatories clearly state that in all instances the date, author, location, and similar information should be furnished for all documents. Examination of Faith's responses to the individual interrogatories reveal them to be wholly inadequate. For example, in response to Interrogatory 3 which inquired into what financial records are consulted by Faith's bookkeepers and accountants, Faith responded: "every bill, record, journal, ledger, individual contribution record, payroll record, account receivable record, contribution receipt to donors, church government report, checking accounts and receipts." In response to Interrogatory 8 which inquired into financial records concerning recent fundraising projects, Faith responded: "Information presented by auditor for Wescott Christian Center, Faith does not

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[86] 74 F.R.D. 497 (C.D. Cal. 1975). In that multi-party proceeding, one of the parties had commenced discovery by serving nearly 3,000 interrogatories, covering nearly 400 pages. Responses by even one party would have cost approximately $24,000. If the other parties had proceeded in kind, the discovery proceedings would clearly have been delayed interminably.

know what documents he consulted." In response to Interrogatory 9 which inquired into documents indicating funds used for specific projects, Faith responded: "Wescott Christian Center cash receipt and disbursement records . . ." In response to Interrogatory 10 which inquired into records indicating the segregation of broadcast funds from other funds, Faith responded: "The audited statements by the independent outside C.P.A. and the C.P.A.'s work papers . . ." In response to Interrogatory 11 which inquired into records in the possession of Wescott, Faith responded: "Faith does not know all of the documents . . ." In response to Interrogatory 32 which inquired into records in the possession of Wescott, Faith responded: "Faith does not know all the documents . . ." and "Faith does not know the identity of 'each financial record referred to . . .' " In response to Interrogatory 34 which inquired into records of Dr. Scott's contributions, Faith responded: "Church disbursement records and work papers of Gary Crane, C.P.A." In response to Interrogatory 36 which inquired into records of Dr. Scott's contributions, Faith responded: "Faith promise pledges and contribution receipt forms in Dr. W. Eugene Scott's possession." In each case Faith either professed ignorance or referred to general classes of records without specifically identifying any.

68. Several of the responses also reflect Faith's contrived interpretation of agency law and claim ignorance of matters concerning Dr. Scott and Wescott. These include: documents in Wescott's possession (Nos. 8, 9, 11, and 32),[87] the officers and directors of Wescott (No. 12),[88] in-

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[87] *See* preceding paragraph.

[88] In effect, Dr. Scott swore that he did not know that he himself was the president of Wescott. In its February 1, 1979 response to the Broadcast Bureau's first interrogatories, Faith told the Commission that Faith and Wescott had the same officers, board of directors, and congregation, and Dr. Scott was the pastor of both churches. By the time of Faith's August 17, 1979 responses, however, Faith reported that Wescott's board of directors had been "reconstituted."

formation concerning videotapes in Wescott's possession (No. 21, 26),[89] Wescott personnel (interrogatory 35), and Dr. Scott's contribution records (No. 36.).[90] In addition, Faith caused needless confusion by responding to interrogatory 4: "Provide the identity of the broadcast programs during which solicitations for money are/were made by Faith officers, directors, and employees' . . ." with the comment ". . . Faith's answer only includes those programs produced and presented by "Faith officers, directors, and employees acting in their capacity as 'Faith officers, directors, and employees'."

69. Additionally, Faith was unresponsive to interrogatory 15, which asks Faith to describe the duties and responsibilities of Wescott directors, officers, and employees which related to the operation of KHOF-TV or monies solicited. Faith replied simply by listing names and titles.

70. Viewing Faith's discovery performance in light of all of the circumstances, we conclude that Faith's renewal application should be dismissed. During these proceedings, Faith has consistently acted in a manner that not only displays bad faith but has seriously impaired the Commission's ability to make an accurate determination of the matters in issue. Faith has consistently proffered essentially the same objections about specificity, constitutional principles, and the alleged separation between Faith and Wescott. While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on

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[89]As previously indicated, Faith had already failed to comply with the ALJ's Order to produce these tapes. Dr. Scott concedes that some of these tapes were kept in an employee's apartment at Scott's direction. *See* para. 84 *et seq., infra.*

[90]Continuing the pattern of its responses to the first interrogatories, Faith does not provide specific information regarding Dr. Scott's contributions although Faith concedes Dr. Scott has the pertinent records in his possession.

these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application. However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. Similarly, its other grounds for noncompliance with discovery Orders, grounds which do not rise to the level of constitutional privilege, were properly rejected by the ALJ, and we perceive no basis for concluding that Faith's continued unresponsiveness on these grounds was justified.

71. Faith's unresponsiveness has seriously compromised the public's right to know whether a television broadcast station is being operated in the public interest. Even where Faith has revealed information, it has required extraordinary effort on the part of the Commission to acquire it. Much information still sought remains withheld. Moreover, as will be seen, although Faith was aware from the very beginning of these proceeding of the availability of the Commission's distress sale policy, Faith elected to exercise that option only after a year or tortuous and futile proceedings.

72. In the Commission's view, Faith's pattern of behavior in these proceedings constitutes a grave abuse of the Commission's processes. Judicial and quasi-judicial forums have the inherent power to protect the integrity of their processes and the public from this type of abuse by dis-

missing the offender's case.[91] We have made this the policy of the Commission.[92] Faith's assertion of alleged First Amendment rights does not, in itself, make this sanction any less appropriate. We determined that reliance on these asserted rights to avoid discovery to be baseless and had so informed Faith prior to discovery.[93] Therefore, we shall dismiss Faith's application with prejudice.

VI. Broadcast Bureau Conduct

73. Faith lists seven examples of what Faith describes as conduct by the Broadcast Bureau designed to deprive Faith of due process. These are: (1) The Bureau's field investigation violated the "Wiley Guidelines" and the Bureau's October 31, 1977 letter incorrectly summarized the results of the investigation; (2) The Bureau refused to disclose the substance of its informants' statements and delayed the taking of their depositions until a time inconvenient to Faith; (3) the Bureau failed to call or depose a witness, Joe Shackelford, who allegedly would corroborate allegations against Faith; (4) The Bureau failed to make a statement by its informants available to Faith; (5) The Bureau failed to complete the exchange of exhibits; (6) the Bureau opposed issuance of a subpoena *duces tecum* to Wescott and (7) the

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[91]*National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Montgomery v. CIR*, 367 F. 2d 917 (9th Cir. 1966). *Compare Societe International v. Rogers*, 357 U.S. 197 (1958) (Dismissal not justified where inability to comply with discovery requests due to circumstances beyond party's control).

[92]*Vue-Metrics, Inc.*, 69 FCC 2d 1049 (1978) *aff'd*, 615 F. 2d 1369 (D.C. Cir. 1980) (discussed *infra* at para. 80).

[93]*See Lyons v. Johnson*, 415 F. 2d 540 (9th Cir. 1978) (5th amendment). *Cf. Barenblatt v. United States*, 360 U.S. 109 (1959) (contempt of congress conviction upheld over claimed infringement of right to free association). *Compare Campbell v. Gerrans*, 592 F. 2d 1054 (9th Cir. 1979) (4 of 34 interrogatories were unanswered but were questionable and presented clear 5th amendment problems; however, failure to answer could be basis for adverse inference at trial).

Bureau has opposed deposition of its own personnel. The Bureau has not responded to these allegations.

74. We find no substance in any of Faith's allegations, and in any event, we do not see how the Broadcast Bureau's alleged misconduct justifies in the least Faith's own improper behavior. With respect to Faith's individual allegations, we make the following findings as to the allegations listed in the preceding paragraph: (1) We have already rejected Faith's complaints concerning the September 1977 field investigation insofar as they are reflected on the record before us in our June 15, 1978 by direction letter and in the instant Order. If Faith wished to develop additional evidence concerning the investigation it would have had the opportunity to do so at the hearing. (2) Faith has received a bill of particulars and has had the opportunity to depose the Bureau's informants; no prejudice to Faith is evident.[94] (3) If Faith wished to have Shackelford deposed or to call him as a witness, it was free to take the initiative to do so. (4) The Commission's rules do not require making the informants' statement available until after the informant testifies.[95] (5) We see no malfeasance by the Bureau in the materials cited by Faith. The Bureau states that it has provided Faith those exhibits available to it and that it would provide additional exhibits when and if they became available.[96] (6) The Commission agrees with the ALJ that in view of the relationship between Faith, Westcott, and Dr. Scott, the requested subpoenas to Wescott are frivolous.[97] (7) The

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[94]*See also* Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc., filed February 1, 1979.

[95]Section 1.362 of the Rules. The Broadcast Bureau claims it released a copy of informant Baumgartner's statement to Baumgartner for transmission to Faith.

[96]Broadcast Bureau letters of November 7, 1979, and March 14, 1980.

[97]*See* FCC 79M-1001, released August 28, 1979.

Commission's rules do not provide for the routine deposition of Commission employees.[98] Faith's desire to observe these employees' demeanor does not justify waiver of the usual rule.

VII. Distress Sale

75. Faith claims that dismissal of its renewal application contravenes the Commission's distress sale policy[99] and urges that its distress sale request be granted. Faith asserts that on January 10, 1979, Faith timely informed the Commission of its intent to explore the possibility of a distress sale, but that it elected to continue with discovery in the interim as a demonstration of good faith and to pursue its constitutional claims. Faith explains, however, that it never elected to forego a distress sale and that in view of other procedural delays, there was no urgency in making a distress sale election. When, on October 30, 1979, Faith notified the ALJ its intention to seek a minority purchaser, the ALJ, in Faith's view, was not justified in rejecting Faith's election. Faith interprets Commission policy as permitting a licensee to elect a distress sale at any time prior to or even shortly following the commencement of the hearing. Accordingly, the ALJ may not usurp the Commission's power to act on the distress sale proposal. Faith submits that it was forced to elect a distress sale at the time because it could not prepare for trial as a result of the burdensome discovery process. Faith asserts that the presiding judge should have

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[98]Section 1.311(b)(2) of the Rules.

[99]*See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978) and *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). The policy permits, subject to the limitations discussed below, a licensee designated for a renewal or revocation proceeding to assign the license to a minority purchaser at a price at or less than 75% of full market value. *Lee Broadcasting Corporation*, 76 FCC 2d 462 (1980).

taken into account that approving the distress sale proposal could have promoted minority participation in broadcasting in a major market and avoided a protracted hearing. Even yet, claims Faith, a distress sale could avoid further proceedings including appellate litigation. Faith denies that it sought a distress sale in bad faith.[100]

76. The Broadcast Bureau responds that Faith has abused the Commission's distress sale policy and should not be rewarded for doing so. The Bureau observes that Faith had apparently contemplated a distress sale as early as November 1978,[101] and had no justification for failing expeditiously to decide one way or another and to inform the Commission of its intentions in this regard. The Bureau submits that Faith already had begun negotiations with TELACU prior to notifying the ALJ that it intended to seek such a buyer. Instead, claims the Bureau, Faith subjected the Commission to pointless discovery proceedings every bit as draining on Commission resources as many hearings the distress sale policy was designed to obviate. According to the Bureau, Faith has attempted to evade Commission scrutiny for as long as possible and has elected to pursue a distress sale only when the hearing or dismissal became imminent. Commission policy, argues the Bureau, does not countenance "playing roulette" with the Commission's processes in this manner. The Bureau claims that in the proceedings cited by Faith, the licensee had promptly elected a distress sale and that Faith's original petition for special relief was both incomplete and violative of Commission's rules.

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[100]TELACU's appeal raises essentially the same points as Faith's.

[101]In a telegram to the Commission dated November 21, 1978, Faith had asked the Commission for a 30 day extension of time in which to advise the Commission whether it intended to elect a distress sale.

77. The Commission rejects Faith's contentions at least as they relate to KHOF-TV. First, we believe that Faith was intentionally dilatory in electing a distress sale. Second, we do not believe that distress sale policy should be used to permit an applicant to avoid the consequences of bad faith obstruction of Commission proceedings. Third, not only would a distress sale here fail to conserve resources by avoiding a hearing but Faith has already wasted substantial resources expended in the pointless discovery proceedings.

78. Contrary to Faith's assertions, we do not think Faith had any justification for not making a prompt decision whether to pursue a distress sale after raising the possibility in its January 10, 1979 letter. Faith was well aware that a prompt decision would be desirable. At the prehearing conference on January 19, 1979, Judge Head expressed his concern that deferring the decision whether to seek a distress sale might result in onerous and unnecessary discovery proceedings, and noted that in a recent case he had continued discovery for a period of five months to permit the licensee to seek a minority purchaser.[102] Observing that the Commission's policy was unclear on the relationship between discovery and distress sales, Judge Head solicited the parties' views. Broadcast Bureau counsel urged that discovery continue — consistent with its position on the prior case — on the grounds that Faith would not go forward with a distress sale until it had learned its chances of losing its license during discovery. Faith's counsel, however, apparently disagreed, and suggested that "we are, in a position, I think in a sense, to make an evaluation with or without discovery of whether we want to go forward with the

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[102]*See* Tr. 75-80. Judge Head referred to *Street Broadcasting Corporation*, 44 RR 2d 1630 (ALJ 1979).

case."[103] Faith's counsel further suggested that if the presiding judge felt it would be conducive to the efficient dispatch of the schedule, Faith's counsel wished to discuss with Faith the possibility of coming in with a motion for a continuance. The ALJ then stated that he had no opinion one way or another at that point whether discovery should be continued.[104] The ALJ set a date of May 29, 1979 as the date requests for continuances had to be submitted and admonished Faith's counsel that if an attempt were made to effectuate a distress sale in May or June he would take into account the time already expended.[105]

79. In light of the fact that the presiding judge specifically called Faith's attention to the undesirability of onerous and unnecessary discovery proceedings, we believe it is inexcusable for Faith to have waited nine full months to move for special relief — and then only to seek a continuance of another 180 days to negotiate a distress sale. Clearly, Faith could have foreseen that protracted prehearing proceedings would result when Faith filed an initial response to the Broadcast Bureau's first interrogatories which objected in whole or in part to fully half of the interrogatories posed and, thereafter, pursued judicial review of the resulting discovery Orders. Nor do we think Faith had justification for failing to act promptly following the dismissal of its judicial appeal on July 13, 1979. When Faith did finally elect to pursue a distress sale on October 30, it made no attempt to explain its failure to seek a continuance earlier but instead offered the bland assertion that it relied on Commission policy that a distress sale could be

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[103]Tr. 78-9.

[104]In its January 10 letter, Faith indicated that it would make its distress sale election by February 27. *See* n. 9, *supra*.

[105]Tr. 86.

elected prior to or shortly following the commencement of hearing. We can only conclude that Faith totally ignored the legitimate concerns voiced by the ALJ and recognized by Faith's counsel. In formulating the distress sale policy we did not intend to undercut the authority of the ALJ to regulate the course of the hearing.[106] The ALJ bears the important responsibility of insuring that administrative proceedings, including discovery, are expeditiously and fairly conducted. Consequently, the ALJ has broad discretion to control the course of the proceedings.[107] To permit a party to ignore the ALJ's valid Orders and frustrate with impunity the ALJ's attempts to bring about an orderly hearing of the issues would undercut the ALJ's authority and contravene the public interest.[108] Therefore, we will not permit the distress sale policy to be used to this effect. A distress sale, contrary to the views of Faith and TELACU is a form of extraordinary relief and depends on the facts and circumstances of the individual petition. Although distress sales are generally granted, they are not a matter of right. We have stated from the outset that "All such transactions will be scrutinized closely to avoid abuses"[109] and that "licensees generally cannot be permitted, far less encouraged, to knowingly play roulette with Commission licensing processes."[110] These statements elaborate upon those in the *Policy Statement* and *Clarification* suggesting that distress sale relief will be available until the initiation of the hearing.

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[106]Administrative Procedure Act §556(c), 5 U.S.C. §556(c) (1977); Section 1.243 of the Rules.

[107]*See Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *Tinker, Inc.*, 4 FCC 2d 372 (1966); *Chronicle Broadcasting Company*, 20 FCC 2d 728 (Rev. Bd. 1969); *WSTE-TV, Inc.*, 13 FCC 2d 848 (Rev. Bd. 1968).

[108]*Vue-Metrics, Inc., supra* at 1058.

[109]68 FCC 2d at 983.

[110]44 RR 2d at 481.

Thus, it would be unreasonable for Faith to rely on the availability of a distress sale to allow itself to abuse our processes and defy the ALJ. While we would not impose any rigid timetable for electing a distress sale, we would expect a licensee to proceed expeditiously in assessing its position and announcing its intent.

80. However, what we have here is not simply a dilatory election of a distress sale. Here, approval of a distress sale would serve to shield Faith from the consequences of bad faith obstruction of the Commission's processes. We do not think this should be permitted. The Commission faced a similar situation in *Vue-Metrics, Inc.*[111] There an applicant was dilatory in responding to discovery regarding the financial ability of its principals. After extended delay had occurred in producing the desired information, the applicant attempted to moot the issue by amending its application with a new financial showing. Although the Commission recognized that permitting the amendment would have the desirable effect of preserving a comparative choice, the Commission concluded that the injury to the integrity of the administrative process that would occur if the Commission ignored the applicant's misconduct outweighed this benefit, and the Commission dismissed the application.

81. We addressed a somewhat similar question in *Bartell Broadcasting of Florida, Inc.*[112] and *Stereo Broadcasters, Inc.*[113] *There, the Commission denied distress sale requests in two "transition cases" — i.e.*, cases in hearing at the time the distress sale policy was first announced — in which an initial decision had already issued at the time

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[111]N. 92, *supra*.

[112]45 RR 2d 1329 (1979).

[113]74 FCC 2d 543 (1979), *appeal pending* Case No. 79-2412 (D.C. Cir.).

of the distress sale request. The Commission reasoned that a distress sale at that point would be undesirable (1) because the opportunity to conserve hearing resources had been lost and (2) once an administrative decision had issued, the public interest and the integrity of the administrative process would not be served by granting a distress sale. We think similar reasoning applies here. The record discloses ample grounds for terminating these proceedings for Faith's failure to prosecute its application. Given this determination, we do not believe the public interest or the integrity of the administrative process would be served by ignoring this conclusion.

82. Faith argues that it is entitled to distress sale relief if it files such a petition at any time prior to the commencement of the hearing. This argument ignores the fact that Faith's failure to respond to valid discovery Orders over an extended period of time was a major reason for extensive delays in the commencement of the evidentiary hearing. The ALJ's granted continuances for the express purpose of giving Faith additional time to respond to discovery requests. They also warned the licensee to make its election to seek distress sale relief early in the proceedings, a recommendation which, if followed, would have prevented an unnecessary waste of Commission resources. Faith did not file its petitions until February 29, 1980 — almost exactly one year from the February 27, 1979 date proposed in Faith's letter, and seven months after the Bureau filed its motion to dismiss for failure to prosecute. And even when it did file, the petition was incomplete — it failed to include two appraisals as required by *Northland Television Inc.*,[114] the controlling precedent at that time. Hence, we reject the proposition that a licensee is entitled to extraordinary relief

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[114] 72 FCC 2d 51 (1979).

merely because it makes its election prior to the start of the hearing. The ALJ has the discretion to consider the request in light of the entire course of the proceedings. Of course a complete petition, filed early in the proceedings, carries a presumption of validity.

83. Our disposition of Faith's appeal necessarily results in partial denial of Faith's petition for special relief. That petition proposes the sale not only of KHOF-TV, San Bernardino, the station immediately at issue, but also co-owned stations KVOF-TV, San Francisco, California, and WHCT-TV, Hartford, Connecticut. The Commission will consider this matter in a separate Order and at that time determine the effect of this proceeding on the respective assignments.[115]

VIII. *Broadcast Bureau's Newly Discovered Evidence*

84. The Broadcast Bureau proffers newly obtained affidavits, which the Bureau claims discloses additional abuse of process and misrepresentation by Faith. These affidavits were executed by former Faith employees Susanna C. Decin and David Footitt.[116] Both affidavits relate to tapes and documents which Faith claimed were unavailable for discovery because they were in the possession of Faith's sister church Wescott. According to the affidavits, however, the tapes

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[115]Petitions to deny have been filed against the Hartford assignment, on June 13, 1980, by The Department of Communications of the Capitol Region Conference of Churches, the Communications Management Team of the Christian Conference of Connecticut, and eight named petitioners and against the San Francisco assignment on June 30, 1980, by Together Medic Ministries and the Inter-Faith Communications Commission. The Broadcast Bureau requested in a pleading, filed July 10, 1980 to be permitted to file comments following disposition of Faith's appeal here. The Bureau will have that opportunity in the forthcoming proceedings.

[116]Susanna C. Decin is now Mrs. David Footitt. For clarity's sake, however, we will continue to refer to her as Decin.

and documents were in fact deliberately concealed at the behest of Faith's president, Dr. Scott.

85. Footitt recites that he was employed by Faith from 1976 through 1979 and served as Dr. Scott's "right-hand man." He relates that Dr. Scott pursuant to the so-called "wild geese" plan rented several trucks, which were used to transport potentially incriminating tapes and documents to be secreted in a Phoenix, Arizona warehouse. Footitt appends copies of truck and warehouse receipts to his affidavit. Footitt states that other material was transported to northern California, and several tapes were hidden in Footitt's apartment in October 1979. Appended to Footitt's affidavit is an alleged receipt from Faith's attorney Edward Masry for the concealed tapes. Footitt also states that when the Broadcast Bureau attempted to depose Faith employees in October 1979, Dr. Scott advised the employees to avoid service by United States marshals. Dr. Scott, Footitt, and Decin allegedly went into hiding in Dr. Scott's Lake Almanor house. Footitt also accuses Dr. Scott of initiating lawsuits to harass potential opponents and discourage investigation.

86. Decin corroborates Footitt's affidavit with respect to the "wild geese" plan, and the avoidance of service by United States marshals. In addition, Decin describes an allegedly fraudulent letter submitted by Faith to the Commission as part of Faith's August 17, 1979 responses to the Broadcast Bureau's first interrogatories. The letter, appended as an exhibit to Decin's affidavit, appears on its face to be from Wescott to Faith. The letter apparently informs Faith that Wescott will not turn over tapes and documents in its possession to Faith because of concerns over Faith's financial performance and government entanglement, and because to do so would be unduly burdensome. The letter chides the Commission for not requesting the

tapes and documents directly from Wescott. The letter is signed by Decin as Secretary of Wescott and dated August 13, 1979. Decin now states that the letter is a fabrication prepared by Dr. Scott, who coerced Decin — never an officer of Wescott — into signing it. Decin claims the use of Wescott was a sham designed to frustrate the Commission. Decin further claims that Faith had been negotiating for the distress sale of its stations long before it first elected such a sale in October 1979. As confirmation, Decin attaches what she describes as a draft letter agreement tendered by Inter-American Broadcasting, Inc. (a subsidiary of TELACU) dated May 10, 1979, and signed by David C. Lizarraga. In view of this draft agreement, the Broadcast Bureau argues that Faith was deliberately dilatory in electing a distress sale.

87. In response, Faith tenders affidavits by Dr. Scott, attorney Michael Goch, and eleven Faith employees. Dr. Scott states that Wescott is not a sham but rather a church formed prior to Dr. Scott's association with Faith. According to Dr. Scott, Wescott insisted on retaining ownership of Dr. Scott's tapes from the inception of Dr. Scott's association with Faith. Contrary to Decin's allegations, Dr. Scott maintains that the letter from Wescott to Faith was the result of a legitimate meeting of Wescott's Board and that Decin was in fact a bona fide corporate officer of Wescott. As to Footitt's allegations, Dr. Scott apparently concedes that documents and tapes were removed from the state of California and that he placed videotapes — which Dr. Scott characterizes as exculpatory — in Footitt's custody. Scott explains this as fulfilling his commitment to preserve this material from government encroachment, a threat which he foresaw based on California state government actions against other religious groups. Scott also concedes that he, Footitt, and Decin went to his parent's home in Lake Al-

manor, but denies this was to avoid service.[117] Scott further explains that he filed lawsuits against Commission employees and informants for the purpose of establishing Faith's constitutional rights and not for the purpose of harassment. Faith also claims that Footitt and Decin were fired for embezzlement and later attempted to blackmail Faith.[118] Faith points out that Decin and Footitt have given depositions exonerating Dr. Scott and inconsistent with their present affidavits.[119] Faith states that it was informed by the Broadcast Bureau that a distress sale election could be made at least up to the commencement of the hearing.

88. More generally, Faith objects to the consideration of the Broadcast Bureau's affidavits at all. Faith argues that it is improper for an appellate body to consider material not presented to the judicial officer making the decision being appealed from.[120]

89. While the Commission believes that the contradictions between the material submitted by the Broadcast Bureau and by Faith raises a substantial question of fact, we are not able to resolve these questions without further hearings.[121] Moreover, as we have dismissed Faith's application

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[117]The eleven employees state they did not attempt to avoid service. As Faith reports, however, the Bureau was unable to serve 14 of its 15 prospective deponents. *Response to Broadcast Bureau's Second Interrogatories and Opposition to Second Motion for Production of Documents*, filed October 24, 1979.

[118]Footitt and Decin claim that Dr. Scott fired Footitt and Decin quit because Dr. Scott disapproved of their marriage. They further state that Dr. Scott has initiated a harassing lawsuit against them.

[119]Footitt and Decin maintain these depositions were given under duress.

[120]*Citing United States v. Gray*, 611 F. 2d 194 (7th Cir. 1979); *Rosen v. Lawson-Hemphill, Inc.*, 549 F. 2d 205 (1st Cir. 1976); *Commonwealth of Massachusetts v. United States Veteran Administration*, 541 F. 2d 119 (1st Cir. 1976)

[121]Faith does admit, however, that Dr. Scott ordered tapes of his broadcasts placed in Footitt's apartment. While the question of Dr. Scott's intent is disputed, we think we may take official notice of Dr. Scott's control of the tapes and documents. *See* para. 87, *supra*.

irrespective of the proffered new material it is not necessary for us to reach these questions.[122]

90. ACCORDINGLY, IT IS ORDERED, That the Request for oral argument, filed July 25, 1980, by Faith Center, Inc. IS DENIED.

91. IT IS FURTHER ORDERED, That the appeal of FCC 79M-1466, released December 13, 1979, by Faith Center, Inc. IS DENIED and FCC 79M-1466 IS AFFIRMED.

92. IT IS FURTHER ORDERED, That the motion for leave to intervene, filed May 7, 1980, by TELACU IS GRANTED.

93. IT IS FURTHER ORDERED, That, the appeals of FCC 80M-459, released March 17, 1980, filed May 7, 1980, by Faith Center, Inc. and TELACU, ARE DENIED; FCC 80M-459 IS AFFIRMED; the application for renewal of

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[122]Several collateral matters remain to be disposed of. (1) As TELACU has demonstrated an interest in these proceedings and its participation will be helpful, TELACU's petition to intervene, filed May 7, 1980, will be granted. *See Max M. Leon, Inc.*, 73 FCC 2d 796 (1978); (2) As we do not feel oral argument will be helpful in this instance, the request for oral argument, filed July 25, 1980, by Faith will be denied; (3) On February 13, 1980, Inspiration Media, of Southern California, Inc. moved to consolidate this proceeding with that involving station KHOF(FM), a comparative proceeding in which IMSC is a competing applicant. This dismissal of this proceeding having rendered the matter moot, the motion will be dismissed; (4) Good cause having been shown, late filed affidavits, filed July 22, 1980, by Faith will be accepted; (5) A reply filed July 21, 1980 by TELACU will be accepted. The Broadcast Bureau's opposition implicitly addressed both Faith's and TELACU's appeals. (6) A letter pleading dated July 22, 1980, written by the Reverend W. Eugene Scott will be stricken as an unauthorized reply. (7) A motion for leave to intervene filed by the Faith Center Department of Development Trust Fund on September 19, 1980 will be denied. In view of the fact the Trust Fund is represented by Dr. Scott who is already participating in this proceeding as president of Faith, and there is no indication that the Trust Fund's position differs in any way from Faith's, we do not see how the Trust Fund's participation would assist the Commission. *See WLCY-TV, Inc.*, 46 CCC 2d 860 (Rev. Bd. 1974); Section 1.223(c) of the Rules.

license for station KHOF-TV, San Bernardino, California, filed August 1, 1977, by Faith Center, Inc. IS DISMISSED WITH PREJUDICE, and this proceeding IS TERMINATED.

94. IT IS FURTHER ORDERED, That Faith Center, Inc. IS AUTHORIZED to continue to operate KHOF-TV until 12:01 a.m. December 28, 1980, PROVIDED, HOWEVER, that if licensee seeks reconsideration or judicial review of our Memorandum Opinion and Order, it is authorized to continue to operate the station until thirty (30) days after the forum which has jurisdiction to review this proceeding issues its mandate.

95. IT IS FURTHER ORDERED, That the Petition for Special Relief, filed February 29, 1980, by Faith Center, Inc. IS DENIED IN PART consistent with the opinion rendered herein.

96. IT IS FURTHER ORDERED, That the motion for consolidation, filed February 13, 1980, by Inspiration Media of Southern California, Inc,. IS DISMISSED as moot.

97. IT IS FURTHER ORDERED, That good cause having been shown, the request for leave to file late filed affidavits, filed July 22, 1980, by Faith Center, Inc., IS GRANTED.

98. IT IS FURTHER ORDERED, That the motion to dismiss filed July 31, 1980, by the Broadcast Bureau, to strike the reply, filed July 21, 1980 by TELACU, IS DENIED.

99. IT IS FURTHER ORDERED, That the opposition, filed August 8, 1980, by the Broadcast Bureau, to strike the motion to dismiss, to recuse or to remand, filed by the Reverend W. Eugene Scott IS GRANTED, and the subject pleading IS STRICKEN.

100. IT IS FURTHER ORDERED, That the motion for leave to intervene, filed September 19, 1980, by Faith Center Department of Development Trust Fund IS DENIED.

101. IT IS FURTHER ORDERED, That the request for leave to file unauthorized pleading, filed August 22, 1980, by the Broadcast Bureau IS GRANTED to the extent consistent with the foregoing opinion and otherwise IS DENIED and the Broadcast Bureau's Comments on Reply, filed August 22, 1980 IS ACCEPTED for filing to the extent consistent with the foregoing opinion.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

APPENDIX E.

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States.

Faith Center, Inc., Petitioner, v. Federal Communications Commission. No. A-209.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 19, 1982.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 27th

APPENDIX F.

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment I.

2. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment V.

APPENDIX G.

Motion to Dismiss.

In the United States Court of Appeals for the District of Columbia Circuit.

Faith Center, Inc., Appellant, v. Federal Communications Commission, Appellee. No. 79-1478.

Faith Center, Inc., licensee of KHOF-TV, San Bernardino, California is engaged in an apparent attempt to resist an FCC investigation into allegations made against it in connection with its license renewal application. It purports to appeal three interlocutory rulings of an FCC administrative law judge which were issued at pre-hearing conferences. The hearing has not yet commenced and the Commission has not had the opportunity to consider any exception to the judge's findings which may be filed when the hearing is completed. This case should be dismissed because the Court lacks jurisdiction to hear the appeal.

The Commission instituted an informal investigation into the licensee's operation after it received a number of complaints including allegations that Faith Center solicited funds over the air which were not used for the purposes described in the broadcasts. As the Broadcast Bureau later set out in a bill of particulars, it was alleged that Dr. Gene Scott, a licensee official, solicited funds for studio equipment, roof repairs and the construction of a foundation but that the money received was not used for those projects. It was also alleged that Dr. Scott was using some of the money raised through the over-the-air appeals for his own personal use by giving it to other organizations in which he had an interest. In addition, it was alleged that fund raising appeals by Dr. Scott were sometimes accompanied by statements that he had pledged money and that he received only $1.00 a year compensation from the church, when, in fact, he

failed to pay the alleged pledge and the church provided him with a $185,000 house rent free and a hotel suite in Pasadena, California costing $2,000-$3,000 per month. [Bill of Particulars, Attachment 1.]

When the informal investigation was unsuccessful in resolving the public interest concerns of the Commission with respect to the operation of the station, the renewal license application was designated for a formal hearing. The designation order sought to determine whether renewal of the license was warranted, and/or whether an Order of Forfeiture should issue for possible violations of the Radio Fraud Statute, 18 U.S.C. §1343. [Order and Notice of Apparent Liability, Attachment 2.]

In a pre-hearing conference the Administrative Law Judge (ALJ) denied Faith Center's request to strike out references in the designation order and bill of particulars to possible violations of the rádio fraud statute. [*Order Following Second Prehearing Conference*, Appendix C of Notice of Appeal.] Faith Center had argued that the fraud allegations should be as specific as a criminal indictment. [Motion to Delete Issue (C), Attachment 3.] The ALJ ruled that general allegations were sufficient in the non-criminal administrative proceeding particularly in light of Faith Center's unwillingness to provide additional information. [Hearing Transcript, Vol. 2, p. 60, Attachment 4.]

In the second and third orders, the ALJ denied Faith Center's attempt to foreclose discovery of licensee records and personnel. [*Order Following Third Prehearing Conference*, Appendix B of Notice of Appeal; *Memorandum Opinion and Order*, Appendix A of Notice of Appeal.] Faith Center had refused to answer interrogatories and provide documents asserting that it was a religious organization protected by the First Amendment. In addition, it argued that, in the absence of a proper fraud charge, the document re-

quests violated the Fourth Amendment's protection against unreasonable searches and seizures. [Memorandum Brief, Attachment 5; Response to Motion For Protection of Documents, Attachment 6.] The ALJ found that a religious organization comes within the purview of the Commission when it secures a license and cannot avoid, by asserting First Amendment protections, the consequences of being a Commission licensee, which include the necessity of facing a hearing on a renewal application when public interest questions are raised. The ALJ was similarly not persuaded by the Fourth Amendment claim in light of the earlier ruling concerning the sufficiency of the fraud allegations.

The interlocutory rulings of the ALJ are not final orders appropriate for review by this Court under Section 402(b) The final order in this case, which can properly be appealed, is the order which will grant or deny Faith Center's renewal application. The hearing has not yet been held. If the hearing results in a denial of Faith Center's application, a proper appeal will permit it to raise the arguments it now seeks to raise or any other arguments. On the other hand, if the order issued should result in a grant of its application, that action would moot its concerns. Under these circumstances, the ALJ's rulings lack finality and the Court does not have jurisdiction to review them.[1]

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[1]The judge denied Faith Center permission for immediate appeal to the Commission pursuant to 47 C.F.R. §1.301(b) because he found that the orders did not raise new or novel questions. [*Order Following Third Prehearing Conference*, Appendix B of Notice of Appeal; Hearing Transcript, Vol. 3, p. 92, Attachment 7; April 20, 1979 Request for Permission To File Appeal, Attachment 8; *Memorandum Opinion and Order*, issued May 10, 1979, Appendix D to Supplementary Notice of Appeal.] Under Section 5(d)(7) of the Communications Act of 1934, 47 U.S.C. §155(d)(7), an application for review is a condition precedent to judicial review of orders made pursuant to delegated authority. Since Faith Center sought but was denied permission to appeal the rulings to the Commission, it appears that Faith Center's opportunity for later review rather than its failure to strictly comply with 47 U.S.C. §155(d)(7), should be the basis for dismissal of this case.

CONCLUSION

Accordingly, the Commission respectfully requests that this case be dismissed.

Respectfully submitted,

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632-7112.

June 22, 1979

APPENDIX H.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1978.

Faith Center, Inc., Appellant, v. Federal Communications Commission, Appellee. No. 79-1478.

Filed: July 13, 1979.

BEFORE: *Wright, Chief Judge; Robb & Wilkey, Circuit Judges.

On consideration of appellee's motion to dismiss, of the response and opposition thereto, and of appellant's motion for stay, it is

ORDERED by the Court that appellant's motion for stay is denied in its entirety, and, it is

FURTHER ORDERED by the Court that appellee's motion is granted and this appeal is dismissed.

Per Curiam

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*Chief Judge Wright did not participate in the foregoing order.

APPENDIX I.

Memorandum Opinion and Order.

Before the Federal Communications Commission, Washington, D.C. 20554.

BC, FCC 81-235, 94673.

In re Application of Faith Center, Inc., Station KHOF-TV, San Bernardino, California, For Renewal of License. BC DOCKET NO. 78-326. File No. BRCT-746.

Adopted: May 7, 1981; Released: May 12, 1981.

By the Commission:

1. Before the Commission for consideration are petitions for reconsideration of a Commission order dismissing the application of Faith Center, Inc. (Faith) for renewal of its license to operate station KHOF-TV, San Bernardino, California, and rejecting a request for a distress sale of that station.[1] Both Faith and its President, Dr. W. Eugene Scott, filed Petitions for Reconsideration on December 3, 1980, the Broadcast Bureau filed an Opposition on January 16, 1981,[2] and Faith filed a reply on February 17.

2. Faith's renewal application for KHOF-TV was designated for hearing in response to allegations that Faith had engaged in fraudulent over-the-air fundraising in violation of the federal wire fraud statute and had failed to cooperate with a Commission investigation of these allegations.[3] Dur-

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[1] *Faith Center, Inc.*, 82 FCC 2d 1 (1980).

[2] Dr. Scott's petition was not filed in accordance with the Commission's rules. Moreover, the petition deals with the Broadcast Bureau's submission of certain affidavits containing substantive allegations about the designated issues. Consideration of these affidavits has been mooted by our disposition of Faith's renewal application on grounds of failure to prosecute. *See Faith Center, Inc., supra*, 82 FCC 2d at 37-39. Dr. Scott's petition will, therefore, be dismissed.

[3] Order and Notice of Apparent Liability, FCC 78-674, released October 11, 1978.

ing the course of the proceeding, the Broadcast Bureau served three sets of discovery requests on Faith. The Commission concluded that Faith's repeated inadequate responses to the first two of these requests revealed a pattern of bad faith obstructive conduct on Faith's part tantamount to failure to prosecute. Denial of Faith's petition for a distress sale of KHOF-TV was a consequence of Faith's misconduct; the Commission did not want to insulate Faith from the consequences of failing to cooperate with the ALJ in the discovery phase of the hearing by permitting a distress sale.

3. Faith's Petition for Rehearing consists mainly of a repetition of arguments made to the Commission in appealing the ALJ's ruling which the Commission affirmed in dismissing Faith's renewal application. Faith again faults the Commission for designating issues inquiring into Faith's alleged failure to cooperate with Commission investigators. Faith also argues that in resisting discovery it made a legitimate and good faith effort to vindicate its constitutional rights. Thus, Faith reiterates its argument that it submitted substantial amounts of information to the Commission, attempted to respond to discovery in good faith, and was not responsible for unwarranted delays in the proceedings. Additionally, Faith renews its contention that a distress sale of KHOF-TV would be appropriate. We need not readdress these arguments. Reconsideration will not be granted by the Commission merely for the purpose of rearguing matters which have previously been considered and resolved.[4] Since Faith has not disclosed any manifest errors or material

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[4] *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Company v. FCC*, 122 U.S.App.D.C. 127, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966).

omissions warranting alteration of the original decision, its petition will be denied.

4 ACCORDINGLY, IT IS ORDERED, That the Petition for Rehearing, filed December 3, 1980, by Faith Center, Inc. IS DENIED.

6. IT IS FURTHER ORDERED, That the Petition for Reconsideration, submitted December 3, 1980, by Dr. W. Eugene Scott IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS
COMMISSION

/s/ William J. Tricarico
William J. Tricarico
Secretary

APPENDIX J.

Memorandum Opinion and Order.

Before the Federal Communications Commission, Washington, D.C. 20554.

FCC 81-236, 94675.

In re Application of, Faith Center, Inc., Station KHOF-TV, San Bernardino, California, For Renewal of License. BC DOCKET NO. 78-326. File No. BRCT-746.

Adopted: May 7, 1981; Released: May 12, 1981.

By the Commission:

1. Faith Center, Inc. (Faith) and the East Los Angeles Community Union (TELACU) petition for reconsideration of the Commission's denial of their proposal for the distress sale to TELACU of two stations licensed to Faith, WHCT-TV, Hartford, Connecticut, and KVOF-TV, San Francisco, California.[1] The 1977 renewal applications for the two stations were placed in deferred status because a third Faith station, KHOF-TV, San Bernardino, California, had been designated for hearing on questions of fraudulent over-the-air fundraising and failure to cooperate with a Commission investigation. The distress sale proposal — covering all three stations — was intended to resolve the hearing proceeding.[2]

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[1] *Faith Center, Inc.*, 48 RR 2d 741 (1980). Faith and TELACU filed petitions on December 8, 1980, which the Broadcast Bureau opposed on January 23, 1981.

[2] The Commission's distress sale policy permits a licensee designated for renewal or revocation proceedings to assign its station to a minority purchaser at a price which may not exceed 75% of the fair market value of the station. *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978); *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978).

2. Shortly after Faith petitioned for distress sale relief the presiding judge dismissed Faith's application for renewal of KHOF-TV.[3] He held that Faith's repeated inadequate responses to Broadcast Bureau discovery requests constituted a pattern of bad faith and obstructive behavior tantamount to a failure to prosecute.

3. The Commission elected to consider Faith's appeal of the dismissal and the distress sale proposal at the same time in order to be able to assess the impact of affirming the dismissal on the distress sale. To complicate matters, the supplemental renewal applications for the two stations in deferred status were due in the near future.[4] The filing of a supplemental renewal would have opened a three month "window" for competing mutually exclusive applications; any filings of mutually exclusive applications would preclude a distress sale.

4. The due date for KVOF-TV's supplemental renewal was August 1, 1980, shortly after the end of the pleading cycle for Faith's appeal. Thus, the Commission did not have time to consider the implications of affirming the ALJ's dismissal of Faith's renewal application for KHOF-TV before the supplemental renewal for KVOF-TV was due. Therefore, the Commission granted a request by TELACU to defer the filing of the supplemental renewal for KVOF-TV until the Commission had the opportunity to decide whether the supplemental renewals should be deferred in-

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[3]80M-459, released March 17, 1981.

[4]Under usual Commission practice, the licensee of a station in deferred status is required to file a supplemental renewal application on the date a regular renewal application would otherwise be due. *See Carlisle Broadcasting Associates*, 59 FCC 2d 885 (1976); Sections 73.1020, 73.3516, and 73.3539 of the Rules. The filing of a supplemental renewal application opens a three month "window" during which petitions to deny and competing applications may be filed.

definitely to permit a distress sale.[5] The filing date was deferred to October 15, 1980. The Commission ordered interested parties to file briefs and reply briefs.

5. Faith and TELACU argued in their briefs that the supplemental renewals for KVOF-TV and WHCT-TV should be deferred indefinitely or the stations should immediately be placed in hearing status to permit a distress sale. They argued in essence that a station in deferred status should be no less transferable than a station in hearing status, especially where the benefits of a distress sale could be realized. They also argued that requiring the filing of supplemental renewals was a discretionary Commission policy that could be waived in appropriate circumstances.

6. The Broadcast Bureau and Together Media Ministries, a prospective competing applicant of KVOF-TV, argued against deferral or designation for hearing. In their view, deferral would violate the *Ashbacker*[6] rights of potential competing applicants, would deprive the affected communities of a comparative choice, and would vest a prohibited property interest in Faith.

7. On October 9, 1980, the Commission considered both Faith's appeal of the KHOF-TV dismissal and the distress sale proposal. The Commission affirmed the dismissal of KHOF-TV and, so as not to insulate Faith from the consequences of its misconduct denied the distress sale proposal as to that station.[7] The Commission also denied the distress sale proposal with regard to the two stations in deferred status. As a procedural matter, the Commission

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[5]FCC 80-460, released August 12, 1980.

[6]*Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) stands for the proposition that mutually exclusive applicants are entitled to comparative hearing.

[7]*Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81-235, adopted May 7, 1981.

did not consider it appropriate to entertain a distress sale proposal of a station not designated for hearing. The Commission noted that Faith's proposed distress sale contemplated an extension of the Commission's distress sale policy which is relief available only to stations in hearing status. We noted that a distress sale was specifically intended to obviate the need for hearing. However, the Commission observed that this did not prejudice Faith, because the two stations could be designated for hearing and a distress sale could be effectuated. The Commission elected to designate WHCT-TV for hearing immediately, but elected not to defer the supplemental renewal date for KVOF-TV. Consequently, on October 15, 1980, Faith filed a supplemental renewal application for KVOF-TV. Subsequently, Faith's Motion for a Stay having been denied,[8] three competing applicants filed against KVOF-TV.

8. Faith and TELACU now complain that the Commission did not address the legal and policy considerations which the parties submitted in their briefs, and that the Commission has not justified treating WHCT-TV and KVOF-TV differently. Faith also argues that the result in this case cannot be reconciled with that in *RKO General, Inc.*[9] in which RKO's 13 radio stations were indefinitely insulated against comparative challenge by being designated for hearing.

9. We will deny the Petition for Reconsideration. Our rules and policies contemplated that normally, at least once every three years, the public will have an opportunity to file

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[8]Faith Center, Inc., 84 FCC 2d 542 (1981).

[9]48 RR 2d 945 (1980). The license renewals for RKO's radio stations had previously been conditioned on the outcome of the *RKO* proceeding in Boston, in which the Commission subsequently denied RKO's license to operate WNAC-TV because of corporate misconduct. *RKO General, Inc.*, 78 FCC 2d 1 (1980).

competing applications for a particular station.[10] If a renewal application or, as in this case, a supplemental renewal application is filed, the Commission may grant distress sale relief only *if no competing applications are filed*. Distress sale relief is not available to stations involved in comparative hearings.[11]

10. In the case of KVOF-TV, Faith Center essentially asked the Commission to deviate from this usual practice and to preclude the filing of competing applications, so that distress sale relief could be provided.[12] To grant this request the Commission would have had to waive applicable rules and policies. To justify such a waiver, Faith bore a heavy burden.[13] Faith failed to satisfy that burden. The only public interest benefit advanced by Faith was that a minority-controlled corporate owner would operate the station. While the Commission is strongly in favor of increasing minority ownership, that interest, under the peculiar circumstances present in this case, did not warrant a waiver of our rules. We anticipated that minority entrepreneurs, as well as other qualified applicants, would file competing applications. This would provide use with an opportunity to select the

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[10]*Supra* note 4. However, there are well established limitations to this policy. For instance, where a renewal application has been designated, and, as a result is already in heavy status, competing applications cannot be filed until the proceeding has been terminated. *Chronicle Broadcasting Co.*, 44 FCC 2d 717, 721 (1974), *affirmed sub nom. Committee for Open Media v. FCC*, 543 F.2d 861 (D.C. Cir. 1976).

[11]*Clarification of Distress Sale Policy, supra*, 44 RR 2d at 480 n. 3.

[12]We recognize that KVOF-TV's request for distress sale relief preceded the supplemental renewal application due date. However, by the time the Commission was prepared to act, the due date was imminent. A party has no vested right to a result it might have obtained, based on a situation that might have existed, if the Commission had expedited its request and acted earlier. *See Chromcraft Corp v. EEOC*, 465 F.2d 1159, 1163 (D.C. Cir. 1969).

[13]*WAIT Radio, Inc. v. FCC*, 418 F.2d 1159, 1163 (D.C. Cir. 1969).

applicant which would best serve the interests of the citizens of San Francisco.[14]

11. In the WHCT-TV proceeding, in contrast, we were inclined to designate that station for hearing and allow it to come within the reach of the distress sale policy because the licensee was not yet due to file its supplemental renewal application. Hence, we could provide the requested relief without waiving any rule or any of our policies. The instant petitions offer no new grounds which would convince us to reconsider our original decisions in distinguishing between KVOF-TV and WHCT-TV.

12. We believe the equities in the present case are considerably different from those in *RKO, supra,* in which potential competitors were cut off despite the general public interest in a comparative choice. We have previously discussed these equities.[15] They are: (1) *RKO* involved extraordinary procedural difficulties because 13 different licenses were involved, the renewal of which came due at different times over a period of two years; (2) potential competitors in *RKO* had previous opportunities to file against RKO after facts impugning RKO's qualifications were publicly available; and (3) RKO's previous renewals had all been granted subject to the condition that we would reconsider the renewals after a final decision in the WNAC-TV proceeding. Equities such as these do not exist in the present case.

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[14]In fact, as a result of our denial of Faith's request, three applicants with significant minority representation have filed competing applications for the ....

[15]84 FCC 2d at 544-45.

13. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration, filed December 8, 1980, by Faith Center, Inc., and the East Los Angeles Community Union ARE DENIED.

FEDERAL COMMUNICATIONS
COMMISSION
William J. Tricarico
Secretary

APPENDIX K.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

October 27, 1982

Kenneth E. Roberson, Esq.
1615 South Glendale Avenue
Glendale, California 91205

Re: Los Angeles, California
BC Docket Number 82-212

Dear Roberson:

The Review Board has under consideration your motion filed October 25, 1982 for permission to file an appeal from the Administrative Law Judge's Memorandum Opinion and Order, FCC 82M-2746, released September 13, 1982, dismissing Faith Center, Inc.'s application, in excess of the prescribed length. Specifically, you assert that an appeal of up to fifty pages is required in order to adequately brief approximately twenty enumerated questions which you wish to raise. Without deciding the matter at this time, it appears to the Board that a number of these questions have been resolved previously in the proceeding in which the D.C. Circuit Court of Appeals affirmed the Commission's dismissal of Faith Center, Inc.'s KHOF-TV renewal application. *See Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon denied*, FCC 81-235 (1981). In addition, other matters you list do not appear to be within the scope of the issues discussed and decided in the order that is being appealed. In view of the foregoing, we believe an appeal of fifteen pages, which is triple the normal page limit, would be more than

adequate to address the pertinent issues raised by the Administrative Law Judge's ruling. Your appeal is to be limited accordingly.

Sincerely yours,
/s/ Joseph A. Marino
Joseph A. Marino
Chairman, Review Board

cc: Eugene F. Mullin, Esq.
Miller & Fields
Roy R. Russo, Esq.

APPENDIX L.

Faith Center and/or Wescott Christian Center

1919 SOUTH GLENDALE AVENUE · GLENDALE, CALIFORNIA 91205

☐ Dr. Gene Scott Ministries 20th. Century Philippian Christian Fund

This Faith Promise is an expression of religious worship to God and as such is a clear expression of the donors freedom of religion expression protected by the First Amendment of the United States Constitution.
Any monies paid on this Faith promise does not create a charitable Trust but is contribution to my Lord Christ through His agency the church and the church denies expressly agrees never to reveal information regarding my donations to any government agency.
Dr. Gene Scott as the Pastor of Faith Center and Wescott Christian Center Churches is expressly authorized to determine designation of these funds, including freedom to change designations or apply all or any part of donation to the general budget and or expense of either Faith Center or Wescott Christian Center Churches. These are unrestricted gifts to God through His Churches, pastored by Dr. Gene Scott and any supervision, required disclosure, or interference by government agencies, will violate my civil rights and U.S.C.A. Title 42, article 1983

EHOP NO. _____ MY FAITH PROMISE $ _____

PHONE: _____ ONE TIME $ _____ MONTHLY $ _____

☐ MR.
☐ MRS.
☐ MISS
☐ REV.
☐ and FAMILY

_____
(First) (Middle) (Last)

_____
Street Address or Box Number

_____
City State Zip Code

COUNSELOR _____ PAYMENT RECEIVED _____ PERM. RECEIPT MADE _____
Date Date

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PHILLIP B. WINBERRY
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

82-867

REVEREND M. EUGENE SCOTT, PhD., Plaintiff-Appellant, -vs- JOEL ROSENBERG, et al., Defendants-Appellees.	No. 81-5387 D.C. No. CV 78-3133-AAH OPINION

Appeal from the United States District Court
for the Central District of California
Andrew A. Hauk, District Judge, Presiding
Argued and Submitted March 3, 1982

BEFORE: WALLACE, SCHROEDER, and CANBY, Circuit Judges.

WALLACE, Circuit Judge:

Scott, the president and pastor of Faith Center Church (the church), brought this action for injunctive relief and for actual and punitive damages against five present and former officers and employees (the government employees) of the Federal Communications Commission (the FCC), alleging that they violated his first amendment rights during an investigation of the church's television and radio stations. The district court granted summary judgment for the government employees. We affirm.

I

Diederich, a former employee of one of the church's television stations, sent a letter to the FCC in which he alleged that Scott had solicited during broadcasts and subsequently received funds for projects which were never under-

taken. He also stated his belief that Scott was using the stations for his personal gain. In response to that letter, the FCC instituted an investigation of the church's California television and radio stations. The FCC conducted a number of interviews during which further allegations were made: that the stations had failed to log paid religious programming as commercial broadcasting, that Scott had misstated the amount of his personal remuneration during broadcast solicitations, and that Scott had made personal pledges during the broadcasts which he had never fulfilled.

Subsequently, two FCC employees made an unannounced visit to the television station located in the main church building to interview employees and investigate records. There is some dispute with respect to how clearly they identified the purpose of their visit and with respect to the scope of their request for access to church and station records. In any event, the church subsequently made available some, but not all, of the materials requested, and thereafter the FCC issued an order designating for hearing the station's application for license renewal and a notice of apparent liability for forfeiture for violation of 18 U.S.C. § 1343, the statute governing fraud by use of radio and television. The record does not indicate the status of the proceedings pertaining to that order. The church has apparently sought relief both before the FCC and in the courts. Those claims of the church, however, are not before us. Scott brought this action not in any representative capacity, but to vindicate his individual rights. He apparently does not, in his personal capacity,

contest the FCC's request for station logs and for his salary records. He does, however, allege that the FCC's inquiry into his personal donations violates his free exercise rights under the first amendment.1/ Scott's claim that his religion requires donations to be made confidentially if they are to be received by God as sacrifices is not disputed.

The questions presented by this appeal are whether Scott has standing to bring this action; whether Scott has a legal basis for his claim under 42 U.S.C. § 1983, under 42 U.S.C. § 1985(3) or directly under the first amendment; whether the FCC employees violated Scott's first amendment rights; and, if so, whether the FCC employees are entitled to immunity. Summary judgment was appropriate because there is no genuine issue as to any material fact.

II

The government employees argue that Scott lacks standing to bring this action because the FCC investigation was directed towards the station and not Scott, and because the FCC requested only church records and none of Scott's personal records. We hold, however, that Scott has standing to assert his claim.

Article III of the Constitution limits the judicial power of the United States to the resolution of actual cases and controversies. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., ___ U.S. _____, _____, 102 S. Ct. 752, 757 (1982) (Valley Forge). A part of this article III requirement is the doctrine of standing. Id. at ____, 102 S. Ct. at 758. The "gist of the

question of standing" is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). At a minimum,

> Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41, 96 S. Ct. 1917, 1924, 1925, 48 L. Ed. 2d 450 (1976).

Valley Forge, supra, ___ U.S. at ____, 102 S. Ct. at 758 (footnote omitted); see Larson v. Valente, ___ U.S. ___, ___, 102 S. Ct. 1673, 1680-83 (1982) (church, as well as its individual followers, had standing under article III to challenge state law requiring religious organizations that received more than half their total contributions from nonmembers to register and report to the state).

But even meeting this article III threshold for standing may be insufficient to gain access to the federal court for redress of certain claims. The Court has also articulated several prudential requirements which limit the category of persons who may invoke the powers of the federal judiciary. When the plaintiff's "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant

exercise of jurisdiction." Warth v. Seldin, 422 U.S. 490, 499 (1975); accord Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216-27 (1974). In addition, the "Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, supra, 422 U.S. at 499; Tileston v. Ullman, 318 U.S. 44 (1943) (per curiam).2/ Under these prudential principles, the judiciary seeks "to limit access to the federal courts to those litigants best suited to assert . . . particular claim[s]" and "to avoid deciding questions of broad social import where no individual rights would be vindicated." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

We conclude that Scott meets the constitutional requirement for standing. The FCC requested church records of Scott's donations. Scott alleges that his religious beliefs require that his giving be secret if it is to be efficacious. The government employees do not deny that this is a tenet of Scott's faith. Scott, therefore, may properly allege injury from disclosure of his donations. If the FCC has already procured the requested records, the alleged injury may be actual. If the FCC has not yet received the documents, but continues to threaten the church with a loss of its license for failure to produce them, the alleged injury is at least threatened. Therefore, the injury aspect of article III standing is met.

The second constitutional standing requirement is that

the injury be traceable to the government employees' action. Here, it is. The church has not and apparently will not release the records voluntarily. But for the FCC's actions, no injury or threat of injury could have occurred. The government employees argue that if they have interfered with any first amendment rights, they are the rights of the church, for no request has been made of Scott personally. Superficially, the argument is plausible, but the law is otherwise. When a governmental demand "imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not . . . deprive the person harmed of standing to vindicate his rights" if he can establish that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." Warth v. Seldin, supra, 422 U.S. at 505; see United States v. SCRAP, 412 U.S. 669 (1973); Roe v. Wade, 410 U.S. 113, 124 (1973).

The final requirement for article III standing is that a favorable decision would prevent or redress the injury. Scott alleges and we assume, see Part V, infra, that he may be entitled to damages if he has suffered a violation of his first amendment rights. Furthermore, if the action of the government employees threatens future violation of his first amendment rights, he is entitled to injunctive relief prohibiting their demands on the church for his donation records. A favorable decision would prevent or redress Scott's injury.

Scott therefore meets the constitutional requirements for standing. We turn now to the prudential requirements. His

asserted harm is a particularized grievance, namely, the threatened or actual dissemination of his personal donation records, and he asserts his own legal rights and interests under the Constitution, not those of the church or of any third person. See generally United States v. Raines, 362 U.S. 17, 21-22 (1960); Barrows v. Jackson, 346 U.S. 249, 256-57 (1953); Tileston v. Ullman, supra, 318 U.S. at 46. The mere fact that the records which have been or may be taken are church records does not mean that the intrusion could violate only the church's rights. See NAACP v. Alabama, 357 U.S. 449, 458-59 (1958). Thus, Scott has standing in this case. We therefore turn to the merits of his claims.

III

Shortly after the FCC initiated its investigation, the Attorney General of the State of California began an investigation of similar allegations pursuant to then-effective California law. Scott alleges that the government employees engaged in a series of telephone conversations and written communications with California officials, and thus participated in the state inquiry, including the state subpoena of church records, in violation of 42 U.S.C. § 1983. We assume for purposes of this appeal that federal employees, like private citizens, can act "under color of state law" and may be liable under section 1983 if they conspire with or participate in concert with state officials who, under color of state law, act to deprive a person of protected rights. See Dombrowski v. Eastland, 387 U.S. 82, 84 (1967) (per curiam); Kletschka v. Driver, 411 F.2d 436, 448-49 (2d Cir. 1969); Peck v. United

States, 470 F. Supp. 1003, 1007 (S.D.N.Y. 1979).

Nevertheless, even when properly viewed in the light most favorable to Scott, the materials submitted in support of and in opposition to the motion for summary judgment present no genuine issue of material fact which can assist him. At most, the government employees requested information from, offered to exchange, and did exchange information with the California attorney general's office by means of which the two agencies assisted one another. The government employees denied by affidavit that they either instigated the state investigation or requested that state investigators procure information for them. Scott produced no evidence to the contrary. Therefore, Scott has raised no genuine issue of material fact which might support his claim for relief under section 1983. See Angel v. Seattle-First National Bank, 653 F.2d 1293, 1299 (9th Cir. 1981); Marks v. United States, 578 F.2d 261, 262-63 (9th Cir. 1978).

The state investigation, including the state subpoena of church records, is the only state action alleged in the complaint. We conclude that the FCC officers were not "willful participant[s] in joint activity with the State or its agents," United States v. Price, 383 U.S. 787, 794 (1966) (construing 18 U.S.C. § 242), simply because they may have furnished some information which facilitated the state investigation. Any FCC request for and receipt of information gathered by the state officials in the course of their independent investigation did not constitute action under color of state law. It is true that "[m]isuse of power, possessed by virtue of state law and

made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Monroe v. Pape, 365 U.S. 167, 184 (1961) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)), overruled on other grounds, Monell v. Department of Social Services, 436 U.S. 658 (1978). But even if we assume that the state officials violated Scott's first amendment rights in the course of their investigation, the mere fact that they may have shared with the government employees information unlawfully procured does not mean that the government employees acted under color of state law. If the government employees requested information from the state in this case, they acted under power possessed by virtue of federal law. If they obtained that information, it was because they were clothed with the authority of federal law. This, without more, is not enough to establish that their conduct was under color of state law. See District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973).

IV

Scott also alleges that the government employees conspired with the California officials and with the church's ex-employees to deprive him of equal protection of the laws in violation of 42 U.S.C. § 1985(3). It may well be that a claim based upon a conspiracy to violate a protected right of religion could be stated pursuant to section 1985(3). See Life Insurance Company of North America v. Reichardt, 591 F.2d 499, 505 & n.15 (9th Cir. 1979). In this case, however, Scott has stated no claim for relief under the statute.

In Griffin v. Breckenridge, 403 U.S. 88 (1971), the

Supreme Court held that section 1985(3) was not "intended to apply to all tortious, conspiratorial interferences with the rights of others." Id. at 101. Rather,

> [t]he language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Id. at 102 (footnotes omitted, emphasis in original). Scott has alleged no class-based, invidiously discriminatory animus for the alleged conspiracy. He has not alleged that the government employees deprived him of his first amendment rights because of his church membership or because he is one of a group holding certain religious beliefs or that the FCC action was in any other way class-based. He has failed to allege any facts from which we might infer a class-based animus. We therefore conclude that he has failed to state a claim for relief under the statute. See Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980); Life Insurance Company of North America v. Reichardt, supra, 591 F.2d at 505; Prochaska v. Fediaczko, 473 F. Supp. 704, 709 (W.D. Pa. 1979) (conspiracy directed only toward the individual exercise of first amendment rights does not state a cause of action under section 1985(3)).

V

We must next decide whether Scott has a claim under the first amendment and, if so, what type of remedy is appropriate. We learned from the Supreme Court in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S.

388 (1971) (Bivens), that a person whose fourth amendment rights have been violated by federal officers has a legal claim implied directly under the fourth amendment and is entitled to recover money damages for his injuries. The same right was extended to a claim arising from a violation of the fifth amendment in Davis v. Passman, 442 U.S. 228 (1979), and to a claim arising from a violation of the eighth amendment in Carlson v. Green, 446 U.S. 14 (1980). The question before us is whether, as with the fourth, fifth, and eighth amendments, a claim also arises under the Constitution for violations of first amendment rights by federal officials.

Ordinarily, a right of action for damages against government officials is given birth by statutory mandate. See Bivens, supra, 403 U.S. at 427-30 (Black, J., dissenting). The right of action judicially created in Bivens must accordingly be treated as an exception. That exception, however, is not limited to the fourth amendment. See Davis v. Passman, supra, 442 U.S. at 248. Indeed, the Court has expanded it to a principle of constitutional liability in very broad language:

> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," Baker v. Carr, 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Id. at 242.

While this analysis assists us with the disposition of this appeal, it is not necessary, as will soon be clear, for us to decide the ultimate issue of whether the first amendment provides a right of action. It is clear, however, that if first amendment rights are justiciable, then Scott is among "the class of litigants who allege that their own constitutional rights have been violated." Id. There has been no suggestion by the government employees that Scott is not among those "who at the same time have no effective means other than the judiciary to enforce these rights." Id. We assume, without deciding, that a private cause of action may be implied directly under the Constitution for violations of the first amendment. See Trapnell v. Riggsby, 622 F.2d 290, 294 (7th Cir. 1980); Dellums v. Powell, 566 F.2d 167, 194-95 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); Paton v. La Prade, 524 F.2d 862, 869-70 (3d Cir. 1975).

Our next question is whether damages is an appropriate form of relief. In Davis v. Passman, the Court stated that "Bivens . . . holds that in appropriate circumstances a federal district court may provide relief in damages for the violation of constitutional rights if there are 'no special factors counselling hesitation in the absence of affirmative action by Congress.'" 442 U.S. at 245; see Butz v. Economou, 438 U.S. 478, 503-04 (1978). Holding that relief in damages was appropriate for violations of the due process clause of the fifth amendment, the Court identified the following policy factors as pertinent areas of inquiry: whether damages have been regarded historically as the ordinary remedy for the injury alleged,

whether relief in damages would be judicially manageable, whether there are available alternative forms of judicial relief, whether evidence suggests that a damages remedy is contrary to the will of Congress, and whether such a remedy would open the courts to a deluge of claims. 442 U.S. at 245-48.

Once more, however, it is unnecessary for us to decide whether these factors favor a damages remedy for violations of the free exercise clause by federal officials. We assume without holding that Scott is entitled to recover damages if his first amendment rights have been unjustifiably violated, see Trapnell v. Riggsby, supra, 622 F.2d at 294; Dellums v. Powell, supra, 566 F.2d at 194-95; Paton v. La Prade, supra, 524 F.2d at 869-70, and may be entitled to injunctive relief from a threat of a violation.

VI

We must next examine the record to determine if there is any genuine factual dispute whether the government employees violated Scott's first amendment rights. Scott alleges that the government employees informed the press and public that they were investigating charges of fraud against Scott. He claims that those statements interfered with the free exercise of his religious obligation to convert others to his beliefs. He also argues that the FCC's demand, in conjunction with its investigation, that the church provide records of his personal pledges during 1976 and 1977, together with information showing the status of those pledges (paid, withdrawn, or outstanding) violates the free exercise clause of the first amendment.

In support of their motions for summary judgment, the government employees submitted affidavits in which they stated that they did not provide any information to the press or public with respect to the specific allegations made against the church. They further testified that they made no statements to the press or public accusing Scott of any criminal or dishonest activity. Scott introduced letters prepared by two of the government employees in response to public and congressional inquiries concerning the investigation. Those letters simply confirm that an investigation was in progress and that it was initiated in response to a complaint alleging irregular conduct. The letters further clarify the FCC's responsibility to investigate such complaints, including possible questions concerning the complainant's credibility. The letters do not, however, support Scott's allegations that the government employees dispatched charges of fraud to the press and public. Scott's allegations are unsupported by a factual presentation. Merely conclusory, they are insufficient to survive the government employees' motion for summary judgment. Angel v. Seattle-First National Bank, supra, 653 F.2d at 1299; Marks v. United States, supra, 578 F.2d at 262-63.

Scott's second argument about the investigation of his pledges presents more difficult questions. It is complicated by the fact that the church owns the broadcast station. Our analysis must be on two levels: first, the result of the actions of the FCC in relation to the station and second, the result of its actions in relation to Scott.

We start with the proposition that first amendment

analysis may be different for broadcasters than for members of other types of media. A greater degree of conflict with traditional first amendment principles is tolerated with the broadcast media because of the limited number of available frequencies. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 383, 386-89 (1969) (broadcast frequencies are a "public trust"; "differences in the characteristics of [the broadcast] media justify differences in the First Amendment standards applied to them."); see Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976) (per curiam) (distinguishing broadcast media cases from traditional free speech cases); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973) ("Red Lion Broadcasting Co. v. FCC makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case.") (citation omitted); cf. Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 375 (fairness doctrine "enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment"). The first question, therefore, is should the FCC be required to meet a different standard prior to investigation of broadcasters of religious programs than it is required to meet prior to investigation of broadcasters of secular programs? More specifically, should the FCC be required to demonstrate a compelling governmental interest prior to investigating an allegation of fraud by one of its licensees that is owned by or affiliated with a

religious organization? We hold that such a requirement is not necessary.

The Federal Communications Act authorizes the FCC to regulate as required by the "public convenience, interest, or necessity," 47 U.S.C. § 303, and does not differentiate types of broadcast licensees. The FCC grants licenses and regulates the public airwaves without differentiating between religious and secular broadcasters. See, e.g., In re PTL of Heritage Village Church & Missionary Fellowship, Inc., 71 F.C.C.2d 324 (1979). In addition, courts have approved the application of FCC rules to religious groups on the same basis as applied to secular groups. See Red Lion Broadcasting Co. v. FCC, supra (fairness doctrine applied to broadcast of a religious program without distinguishing religious and secular broadcasting); King's Garden, Inc. v. FCC, 498 F.2d 51, 60 (D.C. Cir. 1974) ("But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.'"), cert. denied, 419 U.S. 996 (1974); accord Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973); Trinity Methodist Church v. Federal Radio Commission, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933); Hardy & Secrest, Religious Freedom and the Federal Communications Commission, 16 Val. U.L. Rev. 57 (1981).

Requiring the FCC to justify investigations undertaken in response to allegations of fraud by one of its licensees, religious or secular, is not supported by precedent, is impracticable, and might raise other first amendment obstacles. See, e.g., Committee for Public Education & Religious

Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."). Allowing such an investigation of a broadcast station, however, does not necessarily mean that the investigation may be open ended. During the investigation, free expression conflicts may arise. This brings us to the second level of our analysis which pertains to the acts of the FCC in relation to Scott. When a collision between portions of an FCC investigation and free exercise rights occurs, free exercise rights can be protected by requiring the FCC to demonstrate a compelling governmental interest. A compelling governmental interest must be shown at that point because an action taken in the course of an investigation directly conflicts with a sincerely held religious belief. See generally EEOC v. Pacific Press Publishing Association, 676 F.2d 1272 (9th Cir. 1982) (government's compelling interest in ensuring equality in employment opportunity justified burden on exercise of religious publisher's policy prohibiting suits by members against the church).

Here, we conclude that it is necessary to employ compelling state interest analysis because of the unique factual setting. The FCC requested information, the release of which Scott alleges in and of itself violates his religious free exercise right. Thus, there is a direct conflict between a sincerely held religious belief and an action by government officials. As stated by the Fifth Circuit in examining employment policies at a religiously-affiliated college, "the rele-

vant inquiry is not the impact of the [government action] upon the institution, but the impact of the [government action] upon the institution's exercise of its sincerely held religious beliefs." EEOC v. Mississippi College, 626 F.2d 477, 488 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981).

Therefore, we conclude that we can affirm the district court's order granting summary judgment only if the FCC's demand for the records of Scott's donations does not infringe on his first amendment freedoms or, if it does, a compelling governmental interest justifies the demand. Sherbert v. Verner, 374 U.S. 398, 406-07 (1963); see Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972). "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Id. at 215.

In support of his claim, Scott submitted personal affidavits in which he states that he believes that his church contributions are "sacrifices" and that disclosure of his sacrifices would violate their sacred nature. The government employees do not challenge the sincerity of Scott's beliefs. See generally United States v. Ballard, 322 U.S. 78 (1944). Furthermore, Scott's claim is not "so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 715 (1981) (Thomas). We therefore conclude that the FCC's demand interferes with Scott's first amendment rights.

The conclusion that there is conflict between Scott's

beliefs and the demand imposed by the FCC is "only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional." United States v. Lee, ___ U.S. ___, ____, 102 S. Ct. 1051, 1055 (1982); see Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944). The state may justify its infringement on religious liberty if it is necessary to accomplish an overriding governmental interest. United States v. Lee, supra, ___ U.S. at ___, 102 S. Ct. at 1055; Thomas, supra, 450 U.S. at 718; Wisconsin v. Yoder, supra, 406 U.S. at 215; Sherbert v. Verner, supra, 374 U.S. at 406; see also EEOC v. Pacific Press Publishing Association, supra, 676 F.2d at 1279 ("In determining whether a neutrally based statute violates the free exercise clause, courts must weigh three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest . . ., and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."). We must therefore determine whether the governmental interest in preventing the fraudulent practices alleged is sufficiently compelling to justify the burden upon Scott's right to the free exercise of his religion and, if so, whether the demand for church records of Scott's pledges and donations was necessary to further that interest. Whether a governmental interest is or is not compelling is a question of law. See United States v. Lee, supra, ___ U.S. at _____, 102 S. Ct. at 1055-56; Thomas, supra, 450 U.S. at 718-19.

The governmental interest in preventing some crimes is compelling, see Prince v. Massachusetts, supra, 321 U.S. at 166-67, but that interest is not sufficient to permit interference with free exercise rights in every case. See Wisconsin v. Yoder, supra, 406 U.S. at 215. The Supreme Court has repeatedly stated that religious frauds can be penalized. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (dictum) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct."); Schneider v. State, 308 U.S. 147, 164 (1939) (dictum) ("fraudulent appeals may be made in the name of charity and religion . . . [which] may be denounced as offenses and punished by law"); see United States v. Ballard, supra, 322 U.S. at 95 (Jackson, J., dissenting) ("religious leaders may be convicted of fraud for making false representations on [some] matters . . . as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes"). Lower courts have applied this principle to religious organizations conducting fraudulent non-religious activities, see SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976), disapproved on other grounds, Aaron v. SEC, 446 U.S. 680, 687 n.7 (1980), and to individuals soliciting money for pretended religious purposes when religious beliefs were not sincerely held, see People v. Estep, 346 Ill. App. 132, 104 N.E.2d 562, writ dismissed, 413 Ill. 437, 109 N.E.2d 762 (1952), cert. denied, 345 U.S. 970 (1953); People v. Le Grande, 309 N.Y. 420, 131 N.E.2d 712 (1956), and

have concluded that the protections of the first amendment were not applicable.

Here, however, we face the question whether, when an allegedly fraudulent activity is connected with the exercise of sincerely held religious beliefs, the governmental interest in preventing fraud overrides the individual's right of religious freedom. We conclude that the answer depends, at least in part, on the nature of the fraud. We recognize that the protections of the free exercise clause do not "turn upon a judicial perception of the particular belief or practice in question . . . . Courts are not arbiters of scriptural interpretation." Thomas, supra, 450 U.S. at 714, 716; cf. United States v. Ballard, supra (courts may inquire into sincerity, but not truth or falsity, of religious tenets). This case does not involve only an allegation that Scott made certain pledges during his broadcast, but failed to pay them. The FCC investigation centered on allegations that Scott had solicited funds for certain specific projects which had never been undertaken. The government has a compelling interest in preventing the diversion of funds contributed for specific, identified purposes especially when such funds are obtained through the use of the public airwaves. See id. at 95 (Jackson, J., dissenting). Scott claims that in the framework of his religion, it is only important that the contributor give and, having made the gift, the contributor is spiritually blessed, no matter how his donation is used. Scott further states that he must follow "the leanings of the Lord" with respect to the utilization of donations. Scott does not claim, however, that contributors to

identified projects know that their contributions may be used for any purpose which Scott determines to be in accordance with the will of the Lord. Scott does not claim that he clarified this aspect of his religious practice in his broadcast solicitations. At least under these limited circumstances, we conclude that the government has a compelling interest in preventing the diversion of funds from the specifically identified projects for which they have been solicited.

Our final inquiry is whether the government's investigation of Scott's pledge and donation records was necessary to further this compelling interest. We need not determine whether any other aspects of the FCC investigation were justifiable, for Scott contests only the FCC demand for those records. Although not every allegation of fraudulent solicitation would justify the government's interference with the religious practices of individuals and churches, we conclude that the allegations here justified the FCC's narrow and limited inquiry into Scott's donation records.

Several important considerations support this conclusion. First, we believe that the context in which the pledges were made is significant. When Scott and the church decided to acquire television and radio stations, they availed themselves of facilities which, under congressional mandate, must be operated in the public interest. 47 U.S.C. §§ 307(a), 309(a). With respect to the operation of broadcast facilities, the Supreme Court has held that the right of viewers and listeners, not that of broadcasters, is paramount. Columbia Broadcasting System, Inc. v. Democratic National Committee, supra, 412 U.S.

at 102, citing Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 390; see also Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355, 362 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980). An allegation of fraud, even if not sufficiently specific or reliable generally to justify inquiry into solicitations made by a congregation in church, may nevertheless be sufficient to justify inquiry into broadcast solicitations.

Second, the FCC investigation in this case was premised on information sufficiently reliable to justify the limited intrusion on first amendment rights which it engendered. The FCC began its inquiry only after it received a complaint signed by Diederich, a former employee of the television station. In his former employment, Diederich was in a position in which he was likely to have received personal knowledge of the irregularities he alleged. His signed complaint, if knowingly false, could expose him to liability in tort for malicious prosecution, see, e.g., Morfessis v. Baum, 281 F.2d 938, 940 (D.C. Cir. 1960); Hardy v. Vial, 48 Cal. 2d 577, 580-81, 311 P.2d 494, 496-97 (1957); Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952) (action before FCC), and was therefore entitled to a greater inference of reliability than an unsigned statement would have been. Furthermore, before they sought to inspect church records, the government employees conducted several interviews in which they received information to support Diederich's allegations. Certainly, governmental agencies must be wary of complaints which cannot be investigated without interfering with first

amendment rights. Malicious or unsubstantiated allegations could easily be used to harass unpopular religions and their leaders. We are satisfied, however, that the information upon which the FCC acted was sufficiently reliable to justify its investigation.

Third, the investigation in this case was narrow and avoided any unnecessary interference with the free exercise of religion. We can imagine circumstances in which the interference with religion could be substantial enough to overbalance a governmental interest that otherwise would be compelling, but that is not this situation. There was no request for wholesale investigation of the church's financial records, but rather specific requests for records of an FCC licensee concerning Scott's salary and donations, both of which he allegedly misrepresented during broadcast solicitations. The added request, not challenged here, for access to the video tapes of broadcast solicitations and church records detailing the receipt and expenditure of publicly solicited funds also demonstrates the limited focus of the investigation.

Finally, the FCC's demand for access to Scott's donation records was necessary to serve its compelling interest in investigating the alleged diversion of funds. If, as alleged, Scott solicited funds for projects which were never undertaken or if funds contributed to those projects were illegally diverted to other uses, Scott's misrepresentation of his personal pledges may have been intended to induce those contributions and therefore could constitute part of a scheme to defraud. Although other information might be only tangentially

relevant to the objectives of a legitimate inquiry, the nexus between the investigations and the FCC's objective in this case was sufficiently close to comply with the principle that valid restrictions on first amendment rights must embody the least restrictive means of effectuating the government's compelling interest. See Thomas, supra, 450 U.S. at 718; Sherbert v. Verner, supra, 374 U.S. at 407, citing Shelton v. Tucker, 364 U.S. 479, 487-90 (1960). See generally United States v. Lee, supra, ___ U.S. at ___, 102 S. Ct. at 1056 ("Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'", quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)) (citation omitted).

VII

Scott also claims that the actions of the government employees violated the establishment clause of the first amendment. He apparently believes that inquiry into his donation record is only the first step in a contemplated program of pervasive regulation. The government employees have submitted affidavits in which they state that their inquiries were for the purpose of ascertaining the truth of Diederich's allegations and determining whether renewal of the church's license was in the public interest. Scott has alleged no facts from which we can infer that pervasive regulation is either planned or threatened. The government employees were therefore entitled to summary judgment on the establishment claim. Angel v. Seattle-First National Bank, supra, 653 F.2d at 1299; Marks v. United States, supra, 578 F.2d at 262-63.

We hold that the government employees have not unjustifiably violated Scott's first amendment rights, and therefore do not reach the question of immunity. See generally Butz v. Economou, supra (absolute and qualified immunity); Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified immunity).

AFFIRMED.

FOOTNOTES

1. Scott also claimed a deprivation of his fourth, fifth and ninth amendment rights, but cited no supporting authority. We find these claims frivolous.

2. There are certain other prudential limitations on standing which are applied in appropriate circumstances. See, e.g., Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39 n.19 (1976) (the interest of the plaintiff must at least be "'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)).

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No. 82-867

IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Petitioner calls the Court's attention to an FCC decision released on January 26, 1983 in which Review Board Chairman Marino issued a separate statement referring to the "still smoldering controversy" in this case and urging the Commission to permit agency and judicial determination of all constitutional claims before licensees are required to place their licenses in jeopardy. Chairman Marino reasoned as follows:

> "While joining fully in the Board's unanimous decision, this case and the still smoldering controversy in Faith Center, Inc. FCC83R-3, released January 17, 1983, indicate that there is a continuing need for the utilization of procedural means which will permit a radio licensee to obtain Commission

and court adjudication of his constitutional rights without putting his license in jeopardy. See e.g., Pacifica Foundation, 56 FCC 2d 94, para. 15 (1975).

"A decade ago then Chairman Dean Burch warned that often the evil sought to be cured by government action 'requires the delicate hands of a surgeon. The type of surgery that you [the licensees] can best prescribe -- and perform -- within your ranks. I fear as you do the hands of the government that will be called upon as a last resort -- the stubby, gnarled bureaucratic hands that belong on a third string catcher in the minor leagues, not on a public interest physician.' J.A. p. 12 Illinois Citizen

Committee for Broadcast v. FCC, 515 F.2d 397 (D.C. Cir. 1974).

"Past and the recent renewal and revocation cases confirm the wisdom of this Commission's traditional reliance on licensee self restraint, and the Commission's reluctance to take any action which may even remotely infringe upon constitutional rights without first permitting the licensee to obtain judicial review. See e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Yale Broadcasting v. FCC, 478 F.2d 594 (D.C. Cir. 1973); Illinois Citizen Committee, supra; Pacifica Foundation, 56 FCC 2d 94, paras. 15 and 16 (1975), affirmed 438 U.S. 726 (1978).

"In the Hildebrand case, FCC83R-6, the Board's decision deftly corrects

a well meaning but badly flawed effort to sanction an individual licensee who maintained he was exercising his freedom of expression. PRB Ex. 2, p. 12. As previously noted Faith Center's constitutional objections should be sharply focused and directed to the Commission which has jurisdiction over the issue. Faith Center, Inc., supra, FCC83R-3, para. 17."

In the Matter of David Hildebrand, FCC83R-6, PR Nos. 81-302 & 81-303 (released Jan. 26, 1983).

Respectfully submitted,
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February 1, 1983

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No. 82-867

In the Supreme Court of the United States

OCTOBER TERM, 1982

FAITH CENTER, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission properly exercised its discretion in dismissing a renewal application for a television station license because the licensee (a religious organization) repeatedly failed to comply with numerous discovery orders for information relevant to an inquiry into allegations of fraudulent solicitation of funds, which, if substantiated, could have disqualified the renewal applicant.

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FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is not reported. The opinion and order of the Federal Communications Commission dismissing petitioner's broadcast license renewal application (Pet. App. 5-68) are reported at 82 F.C.C. 2d 1. The opinion and order of the Commission denying rehearing (Pet. App. 76-78) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1982. A petition for rehearing was denied on June 22, 1982 (Pet. App. 3-4). The petition for a writ of certiorari was filed, after an extention of time, on November 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner Faith Center, Inc. (Faith) is the licensee of television station KHOF-TV in San Bernardino, California.[1] In 1977 the Federal Communications Commission received complaints that KHOF-TV had been used to raise funds over-the-air and that these funds were not used for the purposes described in the broadcast solicitations (Pet. App. 19).[2] The Commission thereafter instituted an informal investigation into Faith's operation of KHOF-TV for possible violations of the wire fraud statute, 18 U.S.C. 1343, which prohibits the use of a television station for the purpose of carrying out any scheme "to defraud" or "for obtaining money * * * by means of false or fraudulent pretenses, representations or promises." The Commission has authority, pursuant to Section 312(a)(6) of the Communications Act, 47 U.S.C. 312(a)(6), to determine whether a television station has violated 18 U.S.C. 1343.

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[1]In addition to being a broadcast licensee, Faith is a nondenominational Christian Church founded in 1947 and headquartered in Glendale, California. Faith and Wescott Christian Center, an affiliated church involved in the proceedings below, are members of the Full Gospel Fellowship of Churches, International. Dr. W. Eugene Scott is the president, treasurer and pastor of Faith and Wescott Christian Center. He is also the president of the Full Gospel Fellowship (Pet. App. 6).

[2]The complaints included allegations that Faith's president and pastor, Dr. Scott, used funds that he had solicited over KHOF-TV for his own personal use by giving them to organizations in which he had an interest, such as the Wescott Christian Center. It was further alleged that fund raising appeals by Dr. Scott were accompanied by false statements that he had pledged money and that he received only $1.00 a year from the church, when, in fact, he failed to pay the alleged pledges and the church provided him with a $185,000 house rent free and a hotel suite costing $2,000 to $3,000 per month (Pet. App. 8-9, 19, 20).

In the course of the Commission's investigation, the licensee repeatedly was requested to make available relevant materials, including videotapes of Dr. Scott's "Festival of Faith" programs, on which solicitations were made.[3] The Commission also sought to obtain accounts receivable ledgers, lists of solicitations and monies received, records of money spent on each project for which funds were solicited, a list of Dr. Scott's own pledges and contributions to Faith, and a list of people making contributions and pledges. Faith refused to comply with these requests. One of the reasons advanced for this refusal was the broad claim that the Commission was seeking the production of material protected from governmental scrutiny by the First Amendment.

On June 15, 1978, the Commission rejected this argument (C.A. App. 52-53).[4] The FCC explained that it frequently must examine a licensee's records in order to fulfill its "responsibility of insuring that broadcast station licensees operate their stations in accordance with the Communications Act, the Commission's rules, regulations and policies, and in a manner consistent with the public interest, convenience and necessity" (C.A. App. 52). Accordingly, the Commission asked that Faith produce the requested materials; however, the Commission stated that it was not then

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[3]Faith's initial reply to the request for the videotapes was that their production would be burdensome and expensive, but it later replied that any existing tapes were the property of its sister church, Wescott Christian Center (Pet. App. 8). Faith subsequently attempted to subpoena the tapes from Dr. Scott (its president and treasurer) and Wescott (of which Dr. Scott is also president and treasurer). The Administrative Law Judge (ALJ) and the Commission both concluded that, in light of the relationship between Faith, Westcott and Dr. Scott, the requested subpoenas were "frivolous" (Pet. App. 54).

[4]"C.A. App." refers to the joint appendix filed in the court of appeals. A copy of the joint appendix has been lodged with the Clerk of this Court.

requiring the licensee to reveal the names of "persons contributing or pledging funds" (C.A. App. 53 n.1). Faith produced some of the requested information, but it continued to resist production of the videotapes, cash receipts and disbursement journals, specific evidence that expenditures for various projects were ever made, and a list of Dr. Scott's own pledges and contributions.

b. Faith's renewal application was then designated for evidentiary hearing pursuant to 47 U.S.C. 309(e). One of the issues raised was whether the over-the-air fund raising broadcasts on KHOF-TV violated 18 U.S.C. 1343 (Pet. App. 6-8).

The Commission's Broadcast Bureau, which had the burden of proceeding with the initial presentation of evidence on this issue, propounded 16 interrogatories to Faith and a request for five categories of documents. The interrogatories sought information about the amount of funds collected as a result of Faith's over-the-air solicitations, the amount actually dedicated to the projects for which money was solicited, the amounts of contributions turned over to Wescott Christian Center, and the extent to which Dr. Scott honored pledges of his own funds (C.A. App. 79-81). The documents requested included videotapes of KHOF-TV's "Festival of Faith" programs, cash receipts, ledgers, and pledges made by Dr. Scott (Pet. App. 11; C.A. App. 74-75).

At a prehearing conference on December 13, 1978, Faith indicated that it would cooperate with the Bureau and informally would produce cancelled checks reflecting payments for certain Faith projects. The ALJ set a hearing date of March 20, 1979, and directed Faith to respond to the Bureau's discovery requests by January 15. At a second prehearing conference, the hearing date was extended to June 26, 1979, to accommodate Faith, which had declared,

on January 10, that it was considering the possibility of a "distress sale" of KHOF-TV.[5]

The Bureau considered Faith's responses to the discovery requests inadequate, and filed a motion to compel Faith to answer its interrogatories. The Bureau stated that it was not asking for donors' names, "at least for the present" (C.A. App. 233 n.2; emphasis omitted). Faith opposed the motion to compel in its entirety, arguing that it was a religious organization protected by the First Amendment and that the Bureau's discovery interfered with its religious beliefs (C.A. App. 250-270).[6]

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[5]Since 1978, the Commission has allowed licensees whose renewal applications have been designated for hearing to sell their stations to minority buyers at a distress price if certain specified conditions have been satisfied. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979 (1978). Cf. *Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026 (D.C. Cir. 1981). This is an exception to the general policy against allowing a broadcaster to assign its license until a determination has been made that the licensee is qualified to hold the authorization. See *Jefferson Radio Co.* v. *FCC*, 340 F.2d 781 (D.C. Cir. 1964).

Faith stated that it would inform the ALJ of its distress sale election by February 27, 1979 (Pet. App. 9). The ALJ warned Faith that if it waited to seek distress sale relief until the scheduled commencement of the hearing in June, he would take into account the time extended in assessing any such requests (Pet. App. 10). In fact, Faith did not announce its intention to make a distress sale of KHOF-TV until October 30, 1979. Its petition for distress sale relief was filed with the FCC on February 29, 1980 (Pet. App. 13, 14).

[6]Although the Commission at the outset had rejected Faith's apparent objection to any inquiry into its practices because of its status as a religious organization (see page 3, *supra*), Faith on a number of occasions appeared to reiterate this claim. In addition to its pleading in response to the motion to compel, Faith asserted at a March 30, 1979, prehearing conference that the *entire* FCC inquiry into its fund-raising practices on KHOF-TV was constitutionally impermissible (C.A. App. 2032-2046). The ALJ rejected Faith's arguments because he considered himself bound by the Commission's prior determinations concerning Faith's constitutional arguments and designating Faith's renewal application for hearing on certain specified issues (C.A. App. 2046-2047).

The ALJ granted the Bureau's motion to the extent it sought information concerning the amounts of money donated that were actually dedicated or expended for the projects for which they were donated and the dates of such expeditures. He also found that Faith had not provided information about the amounts spent for Dr. Scott's personal use or the dates of such expenditures. Finally, the ALJ rejected Faith's refusal to answer certain interrogatories on constitutional grounds (Pet. App. 10). None of these interrogatories required Faith to reveal the names of donors (see C.A. App. 80-81, 233, 272, 274, 2032-2048).

c. Faith then filed a notice of appeal in the United States Court of Appeals for the District of Columbia Circuit, pursuant to Section 402(b) of the Communications Act, 47 U.S.C. 402(b). *Faith Center, Inc.* v. *FCC*, No. 79-1478. In its appeal, Faith challenged various orders of the ALJ and asked the court to intervene at the interlocutory stage to protect Faith's First Amendment rights (Pet. App. 10-11, 39).[7] On July 13, 1979, the court of appeals dismissed Faith's appeal and denied its motion for a stay (Pet. App. 75).[8]

d. Thereafter, Faith filed further responses to the Bureau's discovery requests. The Bureau found these to be inadequate and filed another motion to compel. On July 30,

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[7]Faith's additional argument that the Bureau's discovery also violated the Fourth Amendment subsequently was abandoned and is not before this Court.

[8]Faith did not seek review in this Court of the court of appeals' dismissal of its appeal. Instead, on August 1, 1979, Faith filed a complaint in the United States District Court for the Central District of California, seeking to enjoin the FCC from proceeding with the license renewal hearing. Faith complained in broad terms that the FCC was violating its constitutional rights. On August 31, 1979, the district court granted the Commission's motion to dismiss the complaint. *Faith Center Church* v. *FCC*, Civil No. CV79-2901 NML (C.D. Cal. Aug. 1, 1979), aff'd, No. 79-3660 (9th Cir. Mar. 24, 1980).

1979, the Bureau moved to dismiss Faith's application because of its repeated failures to comply with the ALJ's discovery orders (C.A. App. 329-343). The ALJ issued an order directing Faith to file additional responses to the Bureau's discovery requests by August 17, 1979,[9] and scheduled the evidentiary hearing for November 27, 1979 (Pet. App. 11). Faith filed additional responses to the Bureau's interrogatories, but the Bureau considered the new responses inadequate and requested a ruling on its motion to dismiss Faith's renewal application (Pet. App. 12-13).

In addition, on October 1, 1979, the Bureau filed a second set of interrogatories and a motion for production of documents. The 39 interrogatories requested information about KHOF-TV programs during which solicitations were made, financial records concerning the station's fund-raising projects, funds used for specific projects, segregation of solicited funds from other funds, financial records pertaining to Faith that were in the possession of Wescott Christian Center, the identity and responsibilities of Wescott's officers and directors, the existence and location of the "Festival of Faith" program tapes and the expenses and contributions of Dr. Scott (Pet. App. 12). One of the interrogatories sought information that could be construed to require the disclosure of the names of donors (C.A. App. 553). Faith objected to all of the interrogatories and answered none of them.[10]

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[9]The ALJ's order included a requirement that Faith produce the videotapes of the "Festival of Faith" programs on KHOF-TV for the period from September-November 1976. The production of these tapes had previously been required by the ALJ in three separate orders (see C.A. App. 1337 n.14).

[10]Faith argued that the interrogatories were unduly burdensome, both in terms of quantity and timeliness; that all of the interrogatories were defective in form; that all of the document production was premature; that certain interrogatories were "irrelevant" and not calculated to

On October 30, 1979, Faith requested a continuance of the hearing to negotiate a distress sale. The ALJ denied the continuance because the hearing was imminent and Faith had failed to pursue distress sale relief earlier in the proceeding as it had represented it would (Pet. App. 13).[11]

On December 4, 1979, the ALJ rejected Faith's objections to the Bureau's second set of discovery requests, and ordered Faith to respond within two weeks to the Bureau's interrogatories and its motion to produce. The ALJ stated that Faith had failed to comply with previous discovery orders and warned Faith that continued failure to answer the Bureau's interrogatories and to produce the required documents, including the videotapes, could lead to dismissal of its renewal application. The ALJ noted that Faith had not answered any of the Bureau's 39 interrogatories filed in October, and that Faith's objections consisted largely of generalized complaints (Pet. App. 13).

Faith appealed the ALJ's order to the Commission and asked the FCC to stay the deadline for Faith's discovery response pending disposition of the appeal. On December 18, 1979, Faith filed additional responses to the Bureau's second set of interrogatories. The stay motion was denied by the Commission on December 28, 1979 (Pet. App. 13-14).

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lead to the discovery of admissible evidence; that two interrogatories were objectionable because the information sought could have been requested much earlier; and that one interrogatory was an abuse of the discovery process (Pet. App. 12-13, 45).

[11]On November 27, 1979, the Bureau filed a third set of interrogatories, consisting of 17 interrogatories, and its third motion for production of documents, comprising five classes of documents. Faith's performance with respect to the third set of interrogatories was not a factor in the dismissal of its application either by the ALJ or by the FCC (Pet. App. 38 n.65).

Faith then sought another continuance of the hearing on the ground that it had elected to pursue a distress sale. Faith filed its petition for distress sale relief on February 29, 1980. The ALJ refused to hold the proceeding in abeyance, however, and on March 11, 1980, a further prehearing conference was held in order to consider Faith's most recent responses to the Bureau's second discovery requests (C.A. App. 1937-2029).

2. On March 17, 1980, the ALJ dismissed Faith's license renewal application for KHOF-TV and terminated the proceeding. He concluded that Faith's responses to the Bureau's discovery requests were made in bad faith or were otherwise inadequate, and that Faith had deliberately obstructed the proceedings. In so concluding, the ALJ relied primarily on Faith's responses or lack thereof to 19 separate interrogatories (Pet. App. 41, 49-51; see C.A. App. 893-896).[12]

The Commission affirmed the ALJ's order dismissing Faith's renewal application (Pet. App. 5-68).[13] In the Commission's view, "Faith's unresponsiveness has seriously

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[12]One of these interrogatories could be construed to have asked for the names of donors.

[13]The Commission also denied Faith's distress sale petition to sell KHOF-TV and two other stations licensed to Faith for $15 million (C.A. App. 796). With respect to KHOF-TV, the Commission did not want to insulate Faith from the consequences of its failure to obey valid discovery orders. The proposed sales of the other two stations were denied because neither station had been designated for hearing and the FCC's distress sale policy by its terms does not apply to stations that have not been designated for hearing (Pet. App. 55-62, 79-85). The Commission subsequently designated the renewal application of one of these stations for hearing together with three competing applications. *Faith Center, Inc.*, 90 F.C.C. 2d 519 (1982). The other station involved subsequently was the subject of a proposed distress sale for $4 million, as authorized by the Commission. *Faith Center, Inc.*, 88 F.C.C. 2d 788 (1981). That sale fell through, however, and Faith again is seeking distress sale relief for this station.

compromised the public's right to know whether a television * * * station is being operated in the public interest" (*id.* at 52). The Commission concluded (*ibid.*) that "Faith's pattern of behavior in these proceedings constitutes a grave abuse of the Commission's processes," and it accordingly exercised its inherent power to protect the integrity of its processes by dismissing the renewal application with prejudice (*id.* at 52-53).

The court of appeals affirmed (Pet. App. 1-2). The court expressed its "agreement with the result reached by the Commission, generally for the reasons given by it" (*id.* at 1). The court found "no abuse of discretion or procedural default" by the Commission (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of this Court or any other court, and does not warrant further review.

Petitioner contends that the Commission's order dismissing Faith's license renewal application is invalid because it purportedly is predicated on Faith's refusal, on First Amendment grounds, to disclose donor names and because the dismissal order was entered before Faith could obtain judicial review of its First Amendment claim. In fact Faith's refusal to reveal the names of donors was only a minor and insignificant part of the conduct constituting "a grave abuse of the Commission's processes" (Pet. App. 52) on which the Commission relied in dismissing Faith's renewal application. Thus, notwithstanding petitioner's effort to characterize this case as presenting significant issues concerning FCC regulation of broadcast licensees that are also religious organizations, this case simply involves the application of established general principles relating to the responsibilities of all broadcast licensees under the regulatory scheme established in the Communications Act.

Under this scheme, all licensees, including religious organizations, are public trustees subject to the Commission's broad mandate to assure that they operate their stations in the public interest. 47 U.S.C. 307(d) and 309(a). See *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). See also *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216-219 (1943). Operation in the public interest does not include the use of a broadcast station for the purpose of obtaining money by means of false "pretenses, representations or promises" broadcast over-the-air in violation of 18 U.S.C. 1343. Indeed, the Commission has specific statutory authority to deny a license or to issue a cease and desist order when the provisions of the wire fraud statute are violated. 47 U.S.C. 312(a)(6) and (b)(2).

Petitioner's religious affiliation gives it no exemption from this or any other requirement in the Communications Act. "A religious group, like any other, may buy and operate a licensed radio or television station. * * * But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.' " *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 60 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974), quoting from *Office of Communication of the United Church of Christ* v. *FCC*, *supra*, 359 F.2d at 1003. See also *United States* v. *Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

A broadcaster seeking renewal of its license is accountable before the Commission for the operation of its station and must cooperate when the Commission inquires into relevant aspects of a station's operations. The Commission

inquired into KHOF-TV's over-the-air solicitations of funds after the Commission received complaints that solicited funds were not used for the purposes for which they had been solicited. The record amply supports the conclusions of both the Commission and the ALJ that petitioner refused to comply with numerous valid discovery orders that required petitioner to provide relevant information concerning its alleged violations of 18 U.S.C. 1343.

Petitioner would have it appear as though this case involved the loss of a broadcast license solely because of the licensee's unwillingness, on religious grounds, to divulge the names of donors. In the context of an FCC investigation to determine whether an applicant for the privilege of using "a limited and valuable part of the public domain" (*Office of Communications of the United Church of Christ* v. *FCC*, *supra*, 359 F.2d at 1003) has abused its license by fraudulently soliciting funds, it is doubtful that a religious organization has any right to be treated differently from other licensees when it comes to the FCC's authority to obtain relevant information. And the names of persons who have responded to a public solicitation broadcast over the airwaves by sending funds certainly are relevant to an inquiry into the circumstances surrounding their contributions.[14]

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[14]Petitioner's status as a voluntary applicant for the "free and exclusive use of a limited and valuable part of the public domain" (*Office of Communication of the United Church of Christ* v. *FCC*, *supra*, 359 F.2d at 1003), and the government's legitimate concern with ensuring that this public domain is not used for the purpose of obtaining money by means of false pretenses readily distinguish this case from *NAACP* v. *Alabama*, 357 U.S. 449 (1958), on which petitioner relies (Pet. 22-23). In contrast to this case, where the names of those who responded to broadcast appeals for funds clearly are related to the purpose of the FCC's inquiry, this Court in *NAACP* v. *Alabama* was "unable to perceive" how the names of the NAACP's rank-and-file members had "a substantial bearing" on the issues there involved. 357 U.S. at

But even assuming arguendo that the Commission might not have the same right to donors' names when the licensee is a religious organization as it would in the case of other licensees, petitioner nevertheless would not be entitled to relief here, because virtually all of the relevant discovery requests did not concern the names of donors. Specifically, Faith repeatedly refused to make available the videotapes of Dr. Scott's "Festival of Faith" programs on which fund solicitations were made, and also repeatedly failed to provide requested information about the existence and location of these videotapes. Dismissal of Faith's renewal application also was predicated on its conduct in response to other discovery requests, which concerned such matters as: (1) projects for which funds were solicited; (2) how Wescott expended money it received from Faith; (3) the identity of officers and directors of Wescott and their responsibilities relating to the operation of KHOF-TV and to the funds solicited; (4) KHOF-TV's financial records in Wescott's possession; (5) the segregation from other funds of monies received from broadcast solicitations; and (6) the identity of KHOF-TV's programs during which fund solicitations were made (Pet. App. 41, 49-51). Of the 19 interrogatories which Faith was faulted for not answering properly (Pet. App. 41), only one (interrogatory number 3) could reasonably be interpreted as asking for the names of donors.

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464. Moreover, unlike Faith, the NAACP willingly furnished a substantial amount of seemingly relevant information, apart from its membership lists (*id.* at 465), and "made an uncontroverted showing" that previous disclosure of members' names had exposed the members to "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility." *Id.* at 462.

Thus this is not a case in which a broadcaster otherwise cooperated with the Commission and invoked the First Amendment solely for the limited purpose of withholding donor records from the agency.[15] Instead, this licensee "was playing the dodger to serious charges." *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 238 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982).

This Court has recognized that dismissal is a proper sanction when a party to a proceeding has refused to comply with valid discovery orders. See, *e.g.*, *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976); *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962). Here, the Commission reasonably exercised its broad discretion with respect to sanctions (*FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228-229 (1946)) when it concluded that dismissal of Faith's renewal application was appropriate in light of Faith's inadequate responses to the Commission's attempt to determine whether the public interest would be served by renewing Faith's license.

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[15]Faith never volunteered to provide relevant information or documents with the names of donors deleted, nor did it ever seek a protective order permitting it to delete the names of donors from relevant materials (*e.g.*, pledge cards mailed to Faith after an over-the-air fund raising broadcast) in its possession or otherwise available to it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-867
IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Petitioner Faith Center, Inc. has no parent companies, subsidiaries or affiliates within the meaning of S.Ct.R. 28.1.

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER CHURCHES AND THEIR MEMBERS SURRENDER THEIR FREE EXERCISE RIGHTS WHEN A CHURCH BECOMES A BROADCAST LICENSEE.

A. The Government's flat rejection of free exercise principles, in contradiction to opinions of this and other courts, highlights the importance of this case to all religious broadcasters. As petitioner originally stated, the central issue presented is whether "a central theological mandate requiring church followers to give donations in secret may be overridden without first requiring the Government to demonstrate a compelling interest in the identity of donors and the details of their giving." Petition

14. Rather than argue that this question is not important (as it clearly is) or that it is resolved by prior decisions of this Court (as it has not) or even that the court below directly addressed and correctly resolved this question (as it did not), the Government simply asserts that "a religious organization has [no] right to be treated differently from other licensees when it comes to the FCC's authority to obtain relevant information" and that therefore both the religious licensee and its members lose all free exercise rights in this context. Opposition 12. The issue presented thus transcends the specifics of petitioner's free exercise claims; the issue is whether <u>any</u> religious broadcasters may <u>ever</u> raise such claims.

The Government's position that religious licensees have no first amendment rights is inconsistent not only with this Court's decisions of the last two decades establishing that religiously motivated conduct may be exempt from general secular regulation, see, e.g., Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981),[1] but also with

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[1] This Court's observation that when religious adherents "enter into commerical activity as a matter of choice," they must be bound by the same limits as others engaged in that activity, United States v. Lee, 455 U.S. 252, 261 (1982), was made in the context of the compelling governmental need to obtain revenues and to maintain a workable system of taxation. Nothing in Lee suggests that free exercise rights are automatically sacrificed by voluntary entry into commercial activity in all contexts. Indeed both Ms. Sherbert and Mr. Thomas, whose free exercise rights were upheld by this Court, had voluntarily entered into commercial activity by accepting employment. If Lee does stand for the proposition urged by the Government, see opposition 11, it must be reconciled with Sherbert and Thomas, a task that only this Court can perform. See Lee, supra, (Stevens, J., concurring) (suggestion that

a Ninth Circuit decision rendered as recently as January 21, 1983 in a case related to this very proceeding, which holds that the FCC is indeed bound by first amendment constraints when investigating religious licensees. Scott v. Rosenburg, No. 81-5387, slip. op. at 17 (9th Cir. Jan. 21, 1983). Indeed, the Ninth Circuit agreed with petitioner that the FCC's "demand" for donor records can be upheld only if "a compelling governmental interest justifies the demand." Id. at 18. In so doing, the Ninth Circuit rejected the Government's argument, adopted by the Commission and the District of Columbia

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1/ (Cont'd)
Sherbert is in tension with Lee).

Furthermore, the public donors did not engage in "commercial activity" by their religious acts of giving. Yet their free exercise rights are precisely the rights which petitioner has sought to protect throughout these proceedings.

Circuit in this case, that churches should in this context be treated "like any other group." Opposition 11; see App. 1; App. 36. Hence, there exists a direct conflict between the circuits on this critical question regarding the extent, if any, of first amendment rights of religious licensees in FCC proceedings.

Whether there is a compelling governmental interest that would justify compelled disclosure of petitioner's donor records was never addressed below. Petition 25. The Government now halfheartedly asserts that the names of donors are "relevant to an inquiry into the circumstances surrounding their contributions," Opposition 12, a dubious assertion at

best.[2/] The issue, however, is whether the Government's need for information must be compelling, and, if so, whether under the circumstances of this case such a showing can be made. The opposition itself answers this inquiry in favor of petitioners, suggesting that the FCC's investigation would not have been hampered by maintaining the secrecy of donors' identities. See Opposition 14 n.15.

B. Perhaps aware of the weakness of the contention that Faith Center

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[2/] The only conceivable justification for seeking to learn the circumstances surrounding religious contributions to Faith Center would be to determine whether "funds were not used for the purposes described in broadcast solicitations." Opposition 2. Given that this fact may be determined by comparing petitioner's receipts and expenditures, without regard to the source of those receipts, how the identity of donors has "a substantial bearing" on the issue is difficult "to perceive." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 464 (1958); see Opposition 12 n.14.

and its members lack free exercise rights, the Government alternatively asserts in effect that any first amendment deprivation is de minimus because not all of the relevant discovery requests concerned donor records. Opposition 13. This argument overlooks the fact that nearly half of the interrogatories which petitioner was ordered to answer required disclosure of donor identities and their financial information.[3/] Since the dismissal of Faith

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3/ With respect to the Government's first set of interrogatories, six of the ten questions which the ALJ criticized petitioner for not answering, see 3 Jt. App. 660, requested donor information. See Interrogatories 10, 12, 13-16, 1 Jt. App. 80-81. Of the nineteen questions in the Government's second set of interrogatories which the ALJ determined were not fully answered, see 4 Jt. App. 893-96, seven requested donor information. See Interrogatories 3, 8-11, 32, 36. Even more significant, of the nine interrogatory questions on which the ALJ based his bad faith finding, five requested donor information. 4 Jt. App. 893-96.

Center's license renewal application may have rested at least in part upon petitioner's failure to comply with constitutionally forbidden discovery requests, reversal and remand are required. See Petition 25 n.27. Moreover, if even one interrogatory invaded constitutionally protected domain, thus justifying a failure to respond, the FCC would, of course, be required to redetermine whether, "in light of all of the circumstances," App. 51, dismissal is warranted. Hence, contrary to the Government's position, review by this Court is mandated to vindicate substantial free exercise rights of petitioner and its members.

THE GOVERNMENT STATES NO REASON WHATSOEVER WHY PETITIONER'S DUE PROCESS CONTENTIONS DO NOT MERIT REVIEW

The commission dismissed petitioner's license renewal application based on a finding of bad faith in its discovery performance, a finding explicitly predicated upon the "critcical significance" of the dismissal by the Court of Appeals of a prior interlocutory appeal. See Petition 15-16. The Government does not dispute that the legal significance attached by the FCC to the dismissal of the interlocutory appeal is erroneous. Hence, for this reason alone, vacation of the order dismissing petitioner's renewal application and reconsideration by the FCC are mandatory.

The Government similarly does not dispute that due process requires that objections to discovery which are grounded in the first amendment be adjudicated prior to the imposition of sanctions. Rather, the Government must assume that because, in its view, petitioner has no first amendment rights, petitioner has no due process rights at all. See Opposition 10-14. This "argument," however, rests upon a fundamental misconception of the nature of due process by assuming that such safeguards are afforded only to meritorious claims. Obviously the due process guarantee exists to ensure that even possibly meritorious claims are recognized. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 81 (1972). Accordingly, review by this Court is necessary to rectify the blatant due

process violations at issue here.[4/]

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January 28, 1983

[4/] One inquiry that should have been but was not made is an assessment of the potential harm to donors that would ensue from disclosure of their identities. Buckley v. Valeo, 424 U.S. 1, 71 (1976). Not only would donors certainly suffer a grievous spiritual harm from disclosure of their identities, see Petition 21-22, but the record also shows that, contrary to the Government's suggestion, see Opposition 13 n.14, donors are likely to suffer grievous secular harm as well. See 5 Jt. App. 1086, 1138 (bomb threats). Accordingly, this action should be remanded for reconsideration in light of Brown v. Socialist Workers '74 Campaign Committee (Ohio), 51 U.S.L.W. 4015, 4019 (U.S. Dec. 8, 1982) (No. 81776), which held that such potential inquiries have constitutional dimension.

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Interest of Amicus.

The Church of Scientology of California, Inc., has received the consent of the parties to the case to the filing of this brief amicus curiae, and copies of letters containing that consent are filed with the Clerk of the Court herewith.

Amicus is a nonprofit religious corporation organized under the laws of the State of California. As such it is entitled to the protections of the First Amendment's religion clauses and over the years, in both its publications and its own litigation, it has evinced great concern for the scope of the protection those clauses afford to churches and religions generally.

This case—in which the Federal Communications Commission dismissed a church's television license renewal application because it did not comply with broad discovery orders seeking information about internal church affairs—is of particular concern to the Church of Scientology. For the Church believes that if religion is to survive in the modern day, avenues of religious communication must remain as varied and broad as possible and religious privacy and autonomy must remain inviolate from governmental intrusions.

This case transcends in importance the immediate interests of the particular church involved as a litigant, for it carries consequences for religious freedoms generally. And it is from the perspective of these more general interests in religious freedom that the Church of Scientology puts this brief before the Court.

Statement of the Case.

Faith Center, Inc., a Christian church which holds a television station operating license, and the Federal Communications Commission (FCC) came to loggerheads over a question of religious liberty. Faith Center claimed that FCC discovery requests, made in a license renewal proceeding and seeking broad disclosure of its financial records, intruded upon religious privacy in violation of the free exercise clause and entangled the Government in religious affairs in violation of the establishment clause, and it insisted that the FCC should weigh and rule on those claims before compelling it to comply. The FCC, however, insisted that the fact that the licensee was a church did not place it "beyond the normal scrutiny of the Commission," and it therefore found no need to assess Faith Center's First Amendment claims. Faith Center nevertheless persisted in its contention that the FCC should balance its interests in religious liberty

against the FCC's need for discovery. The upshot was that its license renewal application was dismissed for failure to comply with the discovery orders.

The FCC began an informal investigation of Faith Center's over-the-air fundraising activities, claiming it had received charges of wire fraud from two disgruntled former church employees. When FCC investigators sought to examine the church's financial records and to question its bookkeeping personnel, Faith Center, after responding in part, claimed in a letter to the FCC that the inquiry sought information protected from governmental intrusion by the First Amendment's religion clauses. Without receiving any brief on the matter, hearing arguments or conducting an evidentiary hearing, the FCC replied by letter that the church was subject to "the normal scrutiny of the Commission" like any other licensee. When Faith Center continued to assert its constitutional claims, the FCC set its license renewal application for hearing. The issues designated for hearing included the circumstances surrounding the Church's failure to allow Commission access to certain books, records and employees, whether its over-the-air fundraising broadcasts violated the federal wire fraud statute, and, as a consequence, whether renewal of Faith's license would serve the public interest.

When the Broadcast Bureau filed interrogatories and a motion to produce documents, Faith Center filed a brief contending that the discovery requests violated the religion clauses. After hearing arguments, the administrative law judge refused to rule on those constitutional claims and ordered Faith Center to comply with the discovery requests, stating that "if there are religious First Amendment defenses . . . those arguments can be made at the time of the hearing, after the evidence is in." And, in denying permission to appeal that ruling to the FCC, he declared that "Faith will

be able to make its Constitutional arguments on the merits during the hearing" and "[t]herefore, such arguments will not lie to bar discovery of the factual situation underlying the allegations in this proceeding."

Faith then appealed to the Court of Appeals for the District of Columbia Circuit, but, at the FCC's urging, the case was dismissed because the interlocutory discovery rulings were not final agency orders appropriate for judicial review. Since no tribunal, administrative or judicial, had ruled on the merits of its religion clause objections to discovery, Faith Center continued to assert them.

As the hearing approached, the FCC filed a second set of interrogatories and a second motion to produce documents which broadened the time period at issue from 13 months to three years and which required disclosure of (1) information relating to all Church projects for which funds had been solicited; (2) records which would specifically identify each and every donor, each and every donation of each and every donor, how each and every donation was spent and each and every unpaid pledge of each and every pledgor; (3) records specifying the amounts of money raised for each church project and the manner in which the funds were segregated and spent; (4) pastor pertinent records, including the pastor's preaching notes and biblical commentary.

Faith Center reasserted its constitutional claims, but a successor administrative law judge again refused to rule on them, declaring that "[u]nder the law of this case, Faith's constitutional claims will not affect the Bureau discovery" and quoting the previous judge's discovery ruling. He directed Faith Center to respond, warning that failure to comply "may result in the dismissal of its renewal application." Again raising its constitutional claims, Faith unsuccessfully sought to appeal the interlocutory order to the FCC.

Unsatisfied with Faith Center's responses to the second wave of discovery, the Bureau sought an order to show cause why its renewal application should not be dismissed for failure to prosecute. Without ruling on the motion to show cause or considering lesser sanctions, the successor judge, acting on his own motion, dismissed the renewal application for failure to prosecute.

On appeal the FCC held that "Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm," that "[t]herefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders," and that "[a]bsent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery." The FCC repeatedly stressed that it was Faith's continued assertion of its religion clause objections after the Court of Appeals dismissed its interlocutory appeal that warranted dismissal of the renewal application.

First, the FCC declared:

> We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. *Of critical significance* in reaching this conclusion *is Faith's continued failure to respond subsequent to the Court of Appeals' summary dismissal of its appeal on constitutional grounds* on July 13, 1979. At this point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. (Emphasis supplied.)

Second, it asserted that:

> The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point, in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the Appeals Court Judges' determination as to the propriety of discovery requests. . . .

Third, it stated:

> While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. *Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application.* However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. (Emphasis added.)

The Court of Appeals for the District of Columbia Circuit summarily affirmed the FCC's order "generally for the reasons given by it" in its opinion.

REASONS FOR GRANTING THE WRIT.

The summary and perfunctory manner in which the FCC treated Faith Center's religion clause contentions in this case raises undecided constitutional questions of fundamental importance to religious liberty, questions which transcend the peculiar boundaries of this case, indeed, questions which are of grave concern to all religions and churches in our society. First, in the era of the "electronic church," the FCC's insistence that it will not vary its "normal scrutiny" of license renewal applications where the licensee is a church—that it is as free to intrude upon the internal affairs of a church as it is upon those of a purely commercial and secular licensee—presents the question whether FCC investigations into the internal affairs of church licensees must meet the rigorous standards this Court has held applicable to other forms of governmental inquiry touching First Amendment interests. Second, if so, the FCC's refusal to assess the competing interests at stake, to weigh the governmental need for discovery against the Church's interests in religious privacy and autonomy, raises the question whether the First Amendment requires the same procedural safeguards for adjudication of religion clause claims that this Court has held must be observed when free speech or associational interests are at stake.

I.

Whether FCC Discovery Orders Intruding Into the Internal Affairs of a Church Licensee Must Satisfy the First Amendment's Compelling-Interest and Least-Restrictive-Alternative Standards Is an Important Constitutional Question.

Faith Center's religion clause claims—objecting to wholesale intrusion on its internal financial affairs, including the privacy of its donors—were more than colorable

and, indeed, substantial. "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations," that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [an] effective . . . restraint on freedom of association," and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *Id.* at 460. For "religious worship and discussion" are "forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 102 S.Ct. 269, 274 (1981).

Not only does the First Amendment shelter the anonymity of an organization's members, *e.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), but also

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[1] "Although past cases have frequently acknowledged that the 'chilling effect' of compelled disclosure most severely affects organizations espousing unorthodox or unpopular views . . . the governing authorities do not support [the] . . . assertion that constitutional protection of anonymity of affiliation is *limited* to members of such groups." *Britt v. Superior Court*, 20 Cal.3d 844, 854, 574 P.2d 766, 143 Cal.Rptr. 695 (1978). Thus, in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963), this Court held that while privacy protections "are all the more essential . . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors," they also extend to "all legitimate organizations." *See Buckley v. Valeo*, 424 U.S. 1, 64-68 (1976) (protection has bearing in case of established political parties); *Pollard v. Roberts*, 283 F.Supp. 248, 258 (E.D. Ark. 1968) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968) (extending protection to Republican Party); *cf. Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Baird v. State Bar*, 401 U.S. 1 (1971). Dissident status, however, may affect the balance in determining whether the government interests in disclosure justify the resulting intrusions on associational privacy. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

"the invasion of privacy of belief may be as great where the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), *quoting California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Indeed, First Amendment protection embraces "private associational information" and "private associational conduct" in general. *See, e.g., Ealy v. Littlejohn*, 569 F.2d 219, 227-31 (5th Cir. 1978) (subject matter of meetings, production of organizational leaflet, printed or oral communications of members, protest activity of members); *Bursey v. United States*, 466 F.2d 1059, 1084-88, *rehearing denied*, 466 F.2d 1090 (9th Cir. 1972) (identities of persons responsible for newspaper and pamphlet publication and distribution and the nature of such activity; identities of persons who associated within organization); *Britt v. Superior Court*, 20 Cal.3d 844, 848, 856, 861, 574 P.2d 766, 143 Cal.Rptr. 695 (1978) (subject matter of organization's meetings); *cf., e.g., United States v. United States District Court*, 407 U.S. 297, 320 (1972) ("Official surveillance [of communications] . . . risks infringement of constitutionally protected privacy of speech"); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

There should be no doubt that the FCC's discovery orders "penetrate[d] deeply into the internal affairs" of the church. *See Larson v. Valente*, 102 S.Ct. 1673, 1688 n. 29 (1982). "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas." *Gibson*, 372 U.S. at 558, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality opinion). Because private associational affairs are "pre-

sumptively protected by the First Amendment," *e.g.*, *Bursey v. United States*, 466 F.2d at 1082 & cases there cited, they "are presumptively immune from inquisition." *See e.g.*, *Sweezy v. New Hampshire*, 354 U.S. at 266 (Frankfurter, J., concurring); *Britt v. Superior Court*, 20 Cal.3d at 855; *cf.*, *e.g.*, *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude,' " for such materials are "presumptively protected").

Thus, the Court has promulgated strict standards governing compelled disclosure of private associational matters. The party seeking disclosure bears the heavy burden of demonstrating that it is justified by "a subordinating interest which is compelling." *E.g.*, *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). "The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information," for "[v]alidation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 545. The party urging disclosure must therefore "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *id.* at 546, and this showing "must survive exacting scrutiny." *Buckley v. Valeo, supra*, 424 U.S. at 64. Finally, it must be shown that "the incidental infringement upon First Amendment rights is no greater than is essential to vindicate [the] . . . subordinating interests," *Bursey v. United States*, 466 F.2d at 1083, for those interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the

end can be more narrowly achieved." *E.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Hence, governmental investigation that chills expression "must be highly selective in order to survive challenge under the First Amendment." *See, e.g., Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

Perhaps because privacy and anonymity have played an important role in the history of religious liberty, *see Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Talley v. California*, 362 U.S. 60, 64-65 (1960), the courts have enforced these First Amendment standards especially meticulously where compelled disclosure of private religious matters is sought. *See, e.g., Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78-80 (1st Cir. 1979) (striking down administrative subpoena requiring production of financial records of Catholic schools because government had not borne burden of fully justifying resulting burden on free exercise of religion). In *Fernandes v. Limmer*, 465 F.Supp. 493, 504 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 51 U.S.L.W. 3174 (September 7, 1982), the court, striking down a local ordinance insofar as it required churches engaged in soliciting funds to submit to examination of their financial records, observed:

> No Church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the [church] and deal with it financially is great, as is the impact [on] the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside.

That even the most superficial and tentative inquiry into religious affairs trespasses on First Amendment protected ground is shown by *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the National Labor Relations Act did not cover teachers in church-operated schools. Construing the Act to avoid serious constitutional questions, the Court observed that if the Act embraced religious schools, "the very process of inquiry leading to findings and conclusions" in unfair labor practice proceedings "may impinge on rights guaranteed by the Religion Clauses." 440 U.S. at 502. And it added that "[t]his kind of inquiry and its sensitivity" were "illustrated" by a hearing in which a monsignor was merely asked how many liturgies and masses are required at Catholic parochial high schools. *Id.* at 502 n. 10, 507-08; *see Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (terming, "burdensome and inquisitorial" an examination of religious dissenter conducted prior to licensing of public distribution of literature); *McCormick v. Hirsch*, 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) ("The reach of the investigatory powers [of the NLRB] into the financial affairs of the Church obviously creates the potential for breach of religious liberty").

These First Amendment standards carry full force when disclosure is compelled pursuant to a discovery order in civil litigation. *See Hastings v. North East Independent School Dist.*, 615 F.2d 628 (5th Cir. 1980); *UAW v. Nat'l Right to Work Legal Defense and Educ. Fund*, 590 F.2d 1139 (D.C. Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976); *Britt v. Superior Court*, 20 Cal.3d 844; *cf. Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th

Cir. 1978); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment Co.*, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). This Court's decision in the *Alabama* case establishes that proposition beyond question, for the compelled disclosure there had been embodied in a discovery order issued in a civil lawsuit. "Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." *Britt*, 20 Cal.3d at 857; *see Carey v. Hume*, 492 F.2d at 636.

The FCC's contention that it may exercise its investigatory and inquisitorial powers against Church licensees as freely and broadly as against licensees which do not fall within the First Amendment mantle is, in essence, a claim that it, unlike other governmental agencies, enjoys a special exemption from traditional First Amendment standards. The FCC's power to regulate licensees in the public interest "cannot be invoked as a talismanic incantation to support any exercise of power which can be brought within its ambit" where First Amendment interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) ("war power"). "That the effective exercise of First Amendment rights may undercut a given government's policy on some issues is, indeed, one of the purposes of those rights." *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667, 670 (7th Cir. 1979). The very premise of the First Amendment is that the Government, including the FCC, must regulate churches and religions differently—

more sensitively and only on greater justification—than purely secular entities. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).[2] Moreover, that an FCC license is a benefit or privilege—a matter of grace rather than a constitutional right—does not exempt FCC intrusions into private religious affairs from First Amendment scrutiny, for "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *E.g., Sherbert v. Verner*, 374 U.S. at 404.

Since the FCC in its original letter to Faith Center stated that the Church was, like any other licensee, subject to "the normal scrutiny of the Commission," the administrative law judges held that Faith's religion clause claims were not assertable during discovery proceedings. Hence they did not apply the traditional First Amendment standards in compelling Faith Center to respond to the discovery requests; indeed, they simply did not weigh Faith's constitutional claims.

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[2]The FCC's holding that to accord favored treatment to Church licensees "would raise serious constitutional problems in itself" and that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture" is specious. "The dual prohibition" of the religion clauses distinguishes "the sphere of religious activity . . . from the secular intellectual liberties," and "legal restrictions cannot be applied to religious practices, as they can in much of the secular realm, merely on a showing of a rational relationship between the regulation imposed and the legitimate end sought." *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1155 (D.C. Cir. 1969). Courts have held that religions are entirely exempt from some governmental regulatory schemes. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. at 506-07; *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 117-19 (1952); *Surinach v. Pesquera de Busquets*, 604 F.2d at 76-80; *The Kings Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974). Relieving a church from a governmental burden under the free exercise clause thus simply does not violate the establishment clause. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 411 (1963).

The resulting orders compelling disclosure—violation of which served as the critical basis for the dismissal of Faith's renewal application—thus suffered constitutional defects arising from a profound failure to subject the Broadcast Bureau's need for the discovery to the required "exacting scrutiny." *See, e.g., Buckley v. Valeo*, 421 U.S. at 64. First, the Bureau was not required to show the relevance of the information sought, to demonstrate that it went to "the heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d at 713; *UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *Carey v. Hume*, 492 F.2d at 636. Quite the contrary, the FCC's opinion reversed the burden of proof on this score; it noted that "Faith has not demonstrated that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." The Bureau thus was not required to describe the information it hoped to obtain and its importance to its case with reasonable specificity, but was allowed to proceed on the impermissible basis of mere speculation that the information might be useful. *See Cervantes v. Time, Inc.*, 464 F.2d at 994; *Pollard v. Roberts*, 283 F.Supp. at 257; *cf., e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224-25, 227 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963).

Second, the Bureau was not required to demonstrate that it had exhausted every reasonable alternative source of the information it sought by discovery directed at the church. *See UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *cf., Zerilli v. Smith*, 656 F.2d at 713; *Carey v. Hume*, 492 F.2d at 639; *Riley v. City of Chester*, 612 F.2d at 717-18; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d at 430; *Baker v. F & F Investment Co.*, 470 F.2d at 784; *Miller v. Transamerican Press, Inc.*, 621 F.2d at 726. The compulsion orders thus violated the principle that where First Amendment interests are at stake, "compelled disclosure * * *

[is] normally the end and not the beginning of the inquiry." *See Zerilli v. Smith*, 656 F.2d at 713, *quoting Carey v. Hume*, 492 F.2d at 638.

While the Government must satisfy these compelling-interest and least-restrictive-alternative requirements whenever compelled disclosure intrudes upon the privacy of any presumptively protected association, *see supra*, n.1, the association is, as this court held just last month, entitled to show particular circumstances which diminish the governmental interests in the disclosure and/or increase the disclosure's potential for impairing First Amendment interests and which thus alter the balance to be drawn. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982). Hence the administrative law judge's rulings that Faith Center could not raise its First Amendment claims at the discovery stage suffered a third constitutional defect: they deprived Faith Center of the opportunity to show particular circumstances increasing the burden of justification the Broadcast Bureau bore. *See id.*[3] This defect alone warrants vacation of the Court of Appeals' decision and remand for reconsideration of this case in the light of *Brown*.

The administrative law judges' abnegation of their constitutional duty thus put Faith Center in the unconscionable dilemma of foregoing its religious privacy objections—claims never adjudicated or ruled upon—or insisting on its rights to a ruling on those objections, thus courting dismissal

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[3]Unorthodox religions are, of course, still subjected to widespread public condemnation as "cults" threatening established social values, and it is entirely conceivable that, given the opportunity, Faith Center could "show a 'reasonable probability' that the compelled disclosures will subject [its contributors and recipients of its disbursements] . . . to 'threats, harassment, or reprisals.' " *Brown*, 51 U.S.L.W. 4015, *quoting Buckley*, 424 U.S. at 74.

of its renewal application and loss of its television station.[4] Their promise that constitutional claims could be raised after discovery and the production of evidence was an empty one. For it ignored the undeniable fact that the constitutional damage—the compelled exposure of private religious matters in violation of the free exercise clause—occurs at the precise moment the disclosure takes place. That damage is, of course, irreparable, for no matter what the judge later does, he cannot undo the constitutional wrongs already wrought. The injury is worked by the compelled disclosure; the only remedy is to prevent that disclosure in the first instance, and that requires an immediate ruling on the merits of the constitutional claim.

The administrative law judges' failure to rule on Faith's constitutional claims ignores the Court's recognition that the procedures by which First Amendment claims are evaluated and resolved "assume an importance fully as great as the validity of the substantive rule of law to be applied" and that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Hence, the Court has constructed a "First Amendment 'due process' "—"a series of specific rules designed to prevent insensitive procedural devices from strangling First Amendment interests." Monaghan, *First Amendment "Due Process,"* 83 Harv. L.Rev. 518 (1970). Governmental intrusions upon interests in freedom of expression must "embody the most rigorous procedural

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[4]Contrary to the FCC's opinion, the Court of Appeals' summary dismissal of Faith Center's appeal because it was interlocutory could not and did not "finally put to rest" its constitutional claims regarding the propriety of discovery and thus did not "clearly put [it] on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination." Faith has yet to receive any ruling on the merits of its constitutional objections to discovery.

safeguards" because that freedom is "vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), and compelled disclosure of associational matters constitutes a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. at 64.

Governmental restraint or seizure of expression must be preceded by an adversary judicial determination that it is not constitutionally prohibited.[5] *See e.g., Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965). Compelled disclosure of private associational matters constitutes an "effective restraint" on freedom of association. *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, and it, too, should be preceded by an adversary determination of its constitutional validity.

Faith Center's constitutional claims, then, did not receive the due process the First Amendment commands. In the absence of a prior adversary determination of those claims, based on meticulous scrutiny of the Bureau's showing of its *need* for discovery, the orders compelling disclosure and the resulting dismissal of the renewal application are constitutionally invalid.[6] *See, e.g., UAW v. Nat'l Right to Work*, 590 F.2d at 1153.

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[5]An exception is made for restraints or seizures of alleged obscenity, but even there they must be followed by a prompt adversary judicial determination of their constitutionality. *See, e.g., Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965).

[6]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, it is clear that the FCC deemed this continued assertion "[o]f critical significance in reaching" the conclusion that the renewal application should be dismissed for failure to comply with discovery orders. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: January 5, 1983.

Respectfully submitted,

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No. 82-867
IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF PAUL DIEDERICH, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No. 82-867

IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF PAUL DIEDERICH, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Interest of the Amicus.

Contrary to the Federal Communications Commission's position that the investigation of the petitioner began upon its receiving numerous complaints of fraudulent solicitation by the petitioner, when their investigation began on September 19, 1977 (see Volume 6, Joint Appendix to U.S. Court of Appeals Brief in this matter, pp. 1411, 1440), said allegations could only have consisted of statements the respondent alleges that Paul Diederich made, to wit, that the petitioner raised money for purposes for which it was not expended, and the false statements were made in connection therewith (see "News", FCC, April 21, 1982).

Paul Diederich has never indicated that fraudulent solicitation occurred or that monies were being collected for purposes for which they were not ultimately being expended. Moreover, he never has believed this occurred nor

does he believe it is occurring. (See "Appendix A", esp. pp. 10-11).

Mr. Diederich joins the other amici supporting the petitioner, and believes in the "Theology of Giving" as taught by the petitioner's president, Dr. Gene Scott. He also firmly believes that the stance of the respondent violates the First, Fourth, Fifth, and Ninth Amendment rights of the petitioner, its president, and its contributors, and that, in particular, the giving of money as a form of worship is sacred, that it is an act that is to be done in secret (according to Matthew 6:1-4), and that the F.C.C.'s actions encroach upon that right.

This case—in which the Federal Communications Commission dismissed a church's television license renewal application because it did not comply with broad discovery orders seeking information about internal church affairs—is of particular concern to the amicus. For, if religion is to survive in the modern day, avenues of religious communication must remain as varied and broad as possible and religious privacy and autonomy must remain inviolate from governmental intrusions.

This case transcends in importance the immediate interests of the particular church involved as a litigant, for it carries consequences for religious freedoms generally. And it is from the perspective of these more general interests in religious freedom that the amicus put this brief before the Court.

Statement of the Case.

Faith Center, Inc., a Christian church which holds a television station operating license, and the Federal Communications Commission (FCC) came to loggerheads over a question of religious liberty. Faith Center claimed that FCC discovery requests, made in a license renewal proceeding

and seeking broad disclosure of its financial records, intruded upon religious privacy in violation of the free exercise clause and entangled the Government in religious affairs in violation of the establishment clause, and it insisted that the FCC should weigh and rule on those claims before compelling it to comply. The FCC, however, insisted that the fact that the licensee was a church did not place it "beyond the normal scrutiny of the Commission," and it therefore found no need to assess Faith Center's First Amendment claims. Faith Center nevertheless persisted in its contention that the FCC should balance its interests in religious liberty against the FCC's need for discovery. The upshot was that its license renewal application was dismissed for failure to comply with the discovery orders.

The FCC began an informal investigation of Faith Center's over-the-air fundraising activities, claiming it had received charges of wire fraud from two disgruntled former church employees. When FCC investigators sought to examine the church's financial records and to question its bookkeeping personnel, Faith Center, after responding in part, claimed in a letter to the FCC that the inquiry sought information protected from government intrusion by the First Amendment's religion clauses. Without receiving any brief on the matter, hearing arguments or conducting an evidentiary hearing, the FCC replied by letter that the church was subject to "the normal scrutiny of the Commission" like any other licensee. When Faith Center continued to assert its constitutional claims, the FCC set its license renewal application for hearing. The issues designated for hearing included the circumstances surrounding the Church's failure to allow Commission access to certain books, records and employees, whether its over-the-air fundraising broadcasts violated the federal wire fraud statute, and, as a con-

sequence, whether renewal of Faith's license would serve the public interest.

When the Broadcast Bureau filed interrogatories and a motion to produce documents, Faith Center filed a brief contending that the discovery requests violated the religion clauses. After hearing arguments, the administrative law judge refused to rule on those constitutional claims and ordered Faith Center to comply with the discovery requests, stating that "if there are religious First Amendment defenses . . . those arguments can be made at the time of the hearing, after the evidence is in." And, in denying permission to appeal that ruling to the FCC, he declared that "Faith will be able to make its Constitutional arguments on the merits during the hearing" and "[t]herefore, such arguments will not lie to bar discovery of the factual situation underlying the allegations in this proceeding."

Faith then appealed to the Court of Appeals for the District of Columbia Circuit, but, at the FCC's urging, the case was dismissed because the interlocutory discovery rulings were not final agency orders appropriate for judicial review. Since no tribunal, administrative or judicial, had ruled on the merits of its religion clause objections to discovery, Faith Center continued to assert them.

As the hearing approached, the FCC filed a second set of interrogatories and a second motion to produce documents which broadened the time period at issue from 13 months to three years and which required disclosure of (1) information relating to all Church projects for which funds had been solicited; (2) records which would specifically identify each and every donor, each and every donation of each and every donor, how each and every donation was spent and each and every unpaid pledge of each and every pledgor; (3) records specifying the amounts of money raised for each church project and the manner in which the funds were

segregated and spent; (4) pastor pertinent records, including the pastor's preaching notes and biblical commentary.

Faith Center reasserted its constitutional claims, but a successor administrative law judge again refused to rule on them, declaring that "[u]nder the law of this case, Faith's constitutional claims will not affect the Bureau discovery" and quoting the previous judge's discovery ruling. He directed Faith Center to respond, warning that failure to comply "may result in the dismissal of its renewal application." Again raising its constitutional claims, Faith unsuccessfully sought to appeal the interlocutory order to the FCC.

Unsatisfied with Faith Center's responses to the second wave of discovery, the Bureau sought an order to show cause why its renewal application should not be dismissed for failure to prosecute. Without ruling on the motion to show cause or considering lesser sanctions, the successor judge, acting on his own motion, dismissed the renewal application for failure to prosecute.

On appeal the FCC held that "Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm," that "[t]herefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders," and that "[a]bsent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery." The FCC repeatedly stressed that it was Faith's continued assertion of its religion clause objections after the Court of Appeals dismissed its interlocutory appeal that warranted dismissal of the renewal application.

First, the FCC declared:

> We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. *Of critical significance* in reaching this conclusion *is Faith's continued failure to respond subsequent to the Court of Appeals' summary dismissal of its appeal on constitutional grounds* on July 13, 1979. At this point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. (Emphasis supplied.)

Second, it asserted that:

> The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the Appeals Court Judges' determination as to the propriety of discovery requests. . . .

Third, it stated:

> While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. *Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application.* However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. (Emphasis added.)

The Court of Appeals for the District of Columbia Circuit summarily affirmed the FCC's order "generally for the reasons given by it" in its opinion.

REASONS FOR GRANTING THE WRIT.

The summary and perfunctory manner in which the FCC treated Faith Center's religion clause contentions in this case raises undecided constitutional questions of fundamental importance to religious liberty, questions which transcend the peculiar boundaries of this case, indeed, questions which are of grave concern to all religions and churches in our society. First, in the era of the "electronic church," the FCC's insistence that it will not vary its "normal scrutiny" of license renewal applications where the licensee is a church —that it is as free to intrude upon the internal affairs of a church as it is upon those of a purely commercial and secular licensee—presents the question whether FCC investigations into the internal affairs of church licensees must meet the rigorous standards this Court has held applicable to other forms of governmental inquiry touching First Amendment interests. Second, if so, the FCC's refusal to assess the competing interests at stake, to weigh the governmental need for discovery against the Church's interests in religious privacy and autonomy, raises the question whether the First Amendment requires the same procedural safeguards for adjudication of religion clause claims that this Court has held must be observed when free speech or associational interests are at stake.

I.

Whether FCC Discovery Orders Intruding Into the Internal Affairs of a Church Licensee Must Satisfy the First Amendment's Compelling-Interest and Least-Restrictive-Alternative Standards Is an Important Constitutional Question.

Faith Center's religion clause claims—objecting to wholesale intrusion on its internal financial affairs, including the privacy of its donors—were more than colorable

and, indeed, substantial. "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations," that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [an] effective . . . restraint on freedom of association," and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *Id.* at 460. For "religious worship and discussion" are "forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 102 S.Ct. 269, 274 (1981).

Not only does the First Amendment shelter the anonymity of an organization's members, *e.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), but also

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[1] "Although past cases have frequently acknowledged that the 'chilling effect' of compelled disclosure most severely affects organizations espousing unorthodox or unpopular views . . . the governing authorities do not support [the] . . . assertion that constitutional protection of anonymity of affiliation is *limited* to members of such groups." *Britt v. Superior Court*, 20 Cal.3d 844, 854, 574 P.2d 766, 143 Cal.Rptr. 695 (1978). Thus, in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963), this Court held that while privacy protections "are all the more essential . . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors," they also extend to "all legitimate organizations." *See Buckley v. Valeo*, 424 U.S. 2, 64-68 (1976) (protection has bearing in case of established political parties); *Pollard v. Roberts*, 283 F.Supp. 248, 258 (E.D. Ark. 1968) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968) (extending protection to Republican Party); *cf. Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Baird v. State Bar*, 401 U.S. 1 (1971). Dissident status, however, may affect the balance in determining whether the government interests in disclosure justify the resulting intrusions on associational privacy. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

"the invasion of privacy of belief may be as great where the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), *quoting California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Indeed, First Amendment protection embraces "private associational information" and "private associational conduct" in general. *See, e.g., Ealy v. Littlejohn*, 569 F.2d 219, 227-31 (5th Cir. 1978) (subject matter of meetings, production of organizational leaflet, printed or oral communications of members, protest activity of members); *Bursey v. United States*, 466 F.2d 1059, 1084-88, *rehearing denied*, 466 F.2d 1090 (9th Cir. 1972) (identities of persons responsible for newspaper and pamphlet publication and distribution and the nature of such activity; identities of persons who associated within organization); *Britt v. Superior Court*, 20 Cal.3d 844, 848, 856, 861, 574 P.2d 766, 143 Cal.Rptr. 695 (1978) (subject matter of organization's meetings); *cf., e.g., United States v. United States District Court*, 407 U.S. 297, 320 (1972) ("Official surveillance [of communications] . . . risks infringement of constitutionally protected privacy of speech"); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

There should be no doubt that the FCC's discovery orders "penetrate[d] deeply into the internal affairs" of the church. *See Larson v. Valente*, 102 S.Ct. 1673, 1688 n. 29 (1982). "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas." *Gibson*, 372 U.S. at 558, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality opinion). Because private associational affairs are "pre-

sumptively protected by the First Amendment," *e.g.*, *Bursey v. United States*, 466 F.2d at 1082 & cases there cited, they "are presumptively immune from inquisition." *See e.g.*, *Sweezy v. New Hampshire*, 354 U.S. at 266 (Frankfurter, J., concurring); *Britt v. Superior Court*, 20 Cal.3d at 855; *cf.*, *e.g.*, *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude,' " for such materials are "presumptively protected").

Thus, the Court has promulgated strict standards governing compelled disclosure of private associational matters. The party seeking disclosure bears the heavy burden of demonstrating that it is justified by "a subordinating interest which is compelling." *E.g.*, *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). "The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information," for "[v]alidation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 545. The party urging disclosure must therefore "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *id.* at 546, and this showing "must survive exacting scrutiny." *Buckley v. Valeo*, *supra*, 424 U.S. at 64. Finally, it must be shown that "the incidental infringement upon First Amendment rights is no greater than is essential to vindicate [the] . . . subordinating interests," *Bursey v. United States*, 466 F.2d at 1083, for those interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the

end can be more narrowly achieved." *E.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Hence, governmental investigation that chills expression "must be highly selective in order to survive challenge under the First Amendment." *See, e.g., Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

Perhaps because privacy and anonymity have played an important role in the history of religious liberty, *see Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Talley v. California*, 362 U.S. 60, 64-65 (1960), the courts have enforced these First Amendment standards especially meticulously where compelled disclosure of private religious matters is sought. *See, e.g., Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78-80 (1st Cir. 1979) (striking down administrative subpoena requiring production of financial records of Catholic schools because government had not borne burden of fully justifying resulting burden on free exercise of religion). In *Fernandes v. Limmer*, 465 F.Supp. 493, 504 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 51 U.S.L.W. 3174 (September 7, 1982), the court, striking down a local ordinance insofar as it required churches engaged in soliciting funds to submit to examination of their financial records, observed:

> No Church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the [church] and deal with it financially is great, as is the impact [on] the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside.

That even the most superficial and tentative inquiry into religious affairs trespasses on First Amendment protected ground is shown by *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the National Labor Relations Act did not cover teachers in church-operated schools. Construing the Act to avoid serious constitutional questions, the Court observed that if the Act embraced religious schools, "the very process of inquiry leading to findings and conclusions" in unfair labor practice proceedings "may impinge on rights guaranted by the Religion Clauses." 440 U.S. at 502. And it added that "[t]his kind of inquiry and its sensitivity" were "illustrated" by a hearing in which a monsignor was merely asked how many liturgies and masses are required at Catholic parochial high schools. *Id.* at 502 n. 10, 507-08; *see Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (terming, "burdensome and inquisitorial" an examination of religious dissenter conducted prior to licensing of public distribution of literature); *McCormick v. Hirsch*, 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) ("The reach of the investigatory powers [of the NLRB] into the financial affairs of the Church obviously creates the potential for breach of religious liberty").

These First Amendment standards carry full force when disclosure is compelled pursuant to a discovery order in civil litigation. *See Hastings v. North East Independent School Dist.*, 615 F.2d 628 (5th Cir. 1980); *UAW v. Nat'l Right to Work Legal Defense and Educ. Fund*, 590 F.2d 1139 (D.C. Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976); *Britt v. Superior Court*, 20 Cal.3d 844; *cf. Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th

Cir. 1978); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment Co.*, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). This Court's decision in the *Alabama* case establishes that proposition beyond question, for the compelled disclosure there had been embodied in a discovery order issued in a civil lawsuit. "Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." *Britt*, 20 Cal.3d at 857; *see Carey v. Hume*, 492 F.2d at 636.

The FCC's contention that it may exercise its investigatory and inquisitorial powers against Church licensees as freely and broadly as against licensees which do not fall within the First Amendment mantle is, in essence, a claim that it, unlike other governmental agencies, enjoys a special exemption from traditional First Amendment standards. The FCC's power to regulate licensees in the public interest "cannot be invoked as a talismanic incantation to support any exercise of power which can be brought within its ambit" where First Amendment interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) ("war power"). "That the effective exercise of First Amendment rights may undercut a given government's policy on some issues is, indeed, one of the purposes of those rights." *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667, 670 (7th Cir. 1979). The very premise of the First Amendment is that the Government, including the FCC, must regulate churches and religions differently—

more sensitively and only on greater justification—than purely secular entities. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).[2] Moreover, that an FCC license is a benefit or privilege—a matter of grace rather than a constitutional right—does not exempt FCC intrusions into private religious affairs from First Amendment scrutiny, for "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *E.g., Sherbert v. Verner*, 374 U.S. at 404.

Since the FCC in its original letter to Faith Center stated that the Church was, like any other licensee, subject to "the normal scrutiny of the Commission," the administrative law judges held that Faith's religion clause claims were not assertable during discovery proceedings. Hence they did not apply the traditional First Amendment standards in compelling Faith Center to respond to the discovery requests; indeed, they simply did not weigh Faith's constitutional claims.

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[2]The FCC's holding that to accord favored treatment to Church licensees "would raise serious constitutional problems in itself" and that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture" is specious. "The dual prohibition" of the religion clauses distinguishes "the sphere of religious activity . . . from the secular intellectual liberties," and "legal restrictions cannot be applied to religious practices, as they can in much of the secular realm, merely on a showing of a rational relationship between the regulation imposed and the legitimate end sought." *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1155 (D.C. Cir. 1969). Courts have held that religions are entirely exempt from some governmental regulatory schemes. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. at 506-07; *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 117-19 (1952); *Surinach v. Pesquera de Busquets*, 604 F.2d at 76-80; *The Kings Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974). Relieving a church from a governmental burden under the free exercise clause thus simply does not violate the establishment clause. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 411 (1963).

The resulting orders compelling disclosure—violation of which served as the critical basis for the dismissal of Faith's renewal application—thus suffered constitutional defects arising from a profound failure to subject the Broadcast Bureau's need for the discovery to the required "exacting scrutiny." *See, e.g., Buckley v. Valeo*, 421 U.S. at 64. First, the Bureau was not required to show the relevance of the information sought, to demonstrate that it went to "the heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d at 713; *UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *Carey v. Hume*, 492 F.2d at 636. Quite the contrary, the FCC's opinion reversed the burden of proof on this score; it noted that "Faith has not demonstrated that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." The Bureau thus was not required to describe the information it hoped to obtain and its importance to its case with reasonable specificity, but was allowed to proceed on the impermissible basis of mere speculation that the information might be useful. *See Cervantes v. Time, Inc.*, 464 F.2d at 994; *Pollard v. Roberts*, 283 F.Supp. at 257; *cf., e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224-25, 227 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963).

Second, the Bureau was not required to demonstrate that it had exhausted every reasonable alternative source of the information it sought by discovery directed at the church. *See UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *cf., Zerilli v. Smith*, 656 F.2d at 713; *Carey v. Hume*, 492 F.2d at 639; *Riley v. City of Chester*, 612 F.2d at 717-18; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d at 430; *Baker v. F & F Investment Co.*, 470 F.2d at 784; *Miller v. Transamerican Press, Inc.*, 621 F.2d at 726. The compulsion orders thus violated the principle that where First Amendment interests are at stake, "compelled disclosure * * *

[is] normally the end and not the beginning of the inquiry." *See Zerilli v. Smith*, 656 F.2d at 713, *quoting Carey v. Hume*, 492 F.2d at 638.

While the Government must satisfy these compelling-interest and least-restrictive-alternative requirements whenever compelled disclosure intrudes upon the privacy of any presumptively protected association, *see supra*, n. 1, the association is, as this court held just last month, entitled to show particular circumstances which diminish the governmental interests in the disclosure and/or increase the disclosure's potential for impairing First Amendment interests and which thus alter the balance to be drawn. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982). Hence the administrative law judge's rulings that Faith Center could not raise its First Amendment claims at the discovery stage suffered a third constitutional defect: they deprived Faith Center of the opportunity to show particular circumstances increasing the burden of justification the Broadcast Bureau bore. *See id.*[3] This defect alone warrants vacation of the Court of Appeals' decision and remand for reconsideration of this case in the light of *Brown*.

The administrative law judges' abnegation of their constitutional duty thus put Faith Center in the unconscionable dilemma of foregoing its religious privacy objections—claims never adjudicated or ruled upon—or insisting on its rights to a ruling on those objections, thus courting dismissal

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[3]Unorthodox religions are, of course, still subjected to widespread public condemnation as "cults" threatening established social values, and it is entirely conceivable that, given the opportunity, Faith Center could "show a 'reasonable probability' that the compelled disclosures will subject [its contributors and recipients of its disbursements] . . . to 'threats, harassment, or reprisals.' " *Brown*, 51 U.S.L.W. 4015, *quoting Buckley*, 424 U.S. at 74.

of its renewal application and loss of its television station.[4] Their promise that constitutional claims could be raised after discovery and the production of evidence was an empty one. For it ignored the undeniable fact that the constitutional damage—the compelled exposure of private religious matters in violation of the free exercise clause—occurs at the precise moment the disclosure takes place. That damage is, of course, irreparable, for no matter what the judge later does, he cannot undo the constitutional wrongs already wrought. The injury is worked by the compelled disclosure; the only remedy is to prevent that disclosure in the first instance, and that requires an immediate ruling on the merits of the constitutional claim.

The administrative law judges' failure to rule on Faith's constitutional claims ignores the Court's recognition that the procedures by which First Amendment claims are evaluated and resolved "assume an importance fully as great as the validity of the substantive rule of law to be applied" and that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Hence, the Court has constructed a "First Amendment 'due proces' "—"a series of specific rules designed to prevent insensitive procedural devices from strangling First Amendment interests." Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). Governmental intrusions upon interests in freedom of expression must "embody the most rigorous procedural

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[4]Contrary to the FCC's opinion, the Court of Appeals' summary dismissal of Faith Center's appeal because it was interlocutory could not and did not "finally put to rest" its constitutional claims regarding the propriety of discovery and thus did not "clearly put [it] on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination." Faith has yet to receive any ruling on the merits of its constitutional objections to discovery.

safeguards" because that freedom is "vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), and compelled disclosure of associational matters constitutes a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. at 64.

Governmental restraint or seizure of expression must be preceded by an adversary judicial determination that it is not constitutionally prohibited.[5] *See e.g., Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965). Compelled disclosure of private associational matters constitutes an "effective restraint" on freedom of association, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, and it, too, should be preceded by an adversary determination of its constitutional validity.

Faith Center's constitutional claims, then, did not receive the due process the First Amendment commands. In the absence of a prior adversary determination of those claims, based on meticulous scrutiny of the Bureau's showing of its *need* for discovery, the orders compelling disclosure and the resulting dismissal of the renewal application are constitutionally invalid.[6] *See e.g., UAW v. Nat'l Right to Work*, 590 F.2d at 1153.

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[5]An exception is made for restraints or seizures of alleged obscenity, but even there they must be followed by a prompt adversary judicial determination of their constitutionality. *See e.g., Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965).

[6]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, it is clear that the FCC deemed this continued assertion "[o]f critical significance in reaching" the conclusion that the renewal application should be dismissed for failure to comply with discovery orders. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: January 25, 1983.

Respectfully submitted,

KATHRYN I. OSHIMA,

Counsel of Record for Amicus.

APPENDIX A.

Deposition of Paul Diederich.

United States District Court, Central District of California.

Reverend W. Eugene Scott, PhD., Plaintiff, vs. Wallace Johnson, Chief, Broadcast Bureau, Federal Communications Commission; William B. Ray, Former Chief, Complaints and Compliance Division, Broadcast Bureau, Federal Communications Commission; Arthur L. Ginsberg, Chief, Complaints and Compliance Division, Broadcast Bureau, Federal Communications Commission; Jeffry Malickson, Legal Counsel to the Chief, Complaints and Compliance Division, Broadcast Bureau, Federal Communications Commission; Joel Rosenberg, Investigator, Complaints and Compliance Division, Broadcast Bureau, Federal Communications Commission; Joseph Baumgartner, John Grutzmaker and Paul Deidrich, Defendants.

No. 72-3132 RF (G).

DEPOSITION OF PAUL DIEDERICH

Sherman Oaks, California

Tuesday, November 23, 1982

3:45 P.M.

Q Do you recall where and when that meeting took place, to the best of your recollection?

A The best that I can recall, the meeting would have been sometime in September 1977 in a hotel in Hollywood.

Q Do you recall who was present at that meeting?

A Mr. Rosenberg and another FCC employee. I don't recall his name.

Q Does the name Lyddanne mean anything to you?

A No.

Q After meeting with Mr. Rosenberg and this other gentleman from the FCC, did they ever suggest to you that Faith Center or Dr. Scott were committing fraud?

A I don't recall that that ever came up.

Q Do you recall yourself bringing up any sort of fraud allegations?

A No.

Q Do you recall whether or not these two gentleman brought up fraud allegations?

A I don't recall that that came up.

Q To the best of your recollection, at this time, you do not recall the Broadcast Bureau at that time indicating that fraud was involved; is that correct?

A That's correct.

Q Approximately how long did you work for Faith Center while Dr. Scott was there?

A Approximately one year.

Q During this approximate one-year period, was Dr. Scott on live television and radio almost every night?

A Yes.

Q Approximately how long would his programming every night be?

A I would say anyplace from four to eight hours.

Q He would be live on-camera through this whole period of time?

A Yes.

Q You observed him through this whole period of time?

A Yes.

Q After knowing and working with Dr. Scott for this year period, did you ever know of him to do a dishonest act, insofar as you were concerned?

A No.

MR MASRY: Off the record.

[Discussion held off the record.]

MR. MASRY: May we stipulate that this deposition may be executed under penalty of perjury without the necessity of a notary public seal, and that we'll relieve the court reporter of her duties and obligations. In the event the deponent does not correct the deposition within 30 days, it shall be deemed in its final form.

MR. STEWART: So stipulated.

[Deposition proceedings concluded at 4:10 P.M.]

Office-Supreme Court, U.S.
FILED
JAN 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-867
IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF THE HONORABLE MERVYN M. DYMALLY, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No. 82-867

IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF THE HONORABLE MERVYN M. DYMALLY, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Interest of Amicus.

The amicus, the Honorable Mervyn M. Dymally, member of the U.S. House of Representatives and representing the Thirty-first Congressional District, has received the consent of the parties to the case to the filing of this brief amicus curiae, and copies of letters containing that consent are filed with the Clerk of the Court.

Overturning 200 years of law preserving the separation of church and state, the decision of D.C. Circuit affirming the final order of the Federal Communications Commission would make unlimited supervision by the FCC of churches and their finances and unlimited disclosure to the FCC of individual donation records, including donation amounts,

the price of receiving religious contributions to a church ministry that broadcasts.

My fear is that such compelled disclosure would violate the sacred commitments and constitutional rights, both religious and associational, of the First Amendment, and the right of privacy guaranteed by other amendments. My belief is that the Supreme Court, and not an administrative agency, should resolve the relevant issues, including the limits of government encroachments upon the rights of churches to protect their congregations and contributors rights to anonymous giving as a part of their religious belief, particularly in light of *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

This case—in which the Federal Communications Commission dismissed a church's television license renewal application because it did not comply with broad discovery orders seeking information about internal church affairs—is of particular concern to the amicus. For, if religion is to survive in the modern day, avenues of religious communication must remain as varied and broad as possible and religious privacy and autonomy must remain inviolate from governmental intrusions.

This case transcends in importance the immediate interests of the particular church involved as a litigant, for it carries consequences for religious freedoms generally. And it is from the perspective of these more general interests in religious freedom that the amicus put this brief before the Court.

Statement of the Case.

Faith Center, Inc., a Christian church which holds a television station operating license, and the Federal Communications Commission (FCC) came to loggerheads over a question of religious liberty. Faith Center claimed that FCC

discovery requests, made in a license renewal proceeding and seeking broad disclosure of its financial records, intruded upon religious privacy in violation of the free exercise clause and entangled the Government in religious affairs in violation of the establishment clause, and it insisted that the FCC should weigh and rule on those claims before compelling it to comply. The FCC, however, insisted that the fact that the licensee was a church did not place it "beyond the normal scrutiny of the Commission," and it therefore found no need to assess Faith Center's First Amendment claims. Faith Center nevertheless persisted in its contention that the FCC should balance its interests in religious liberty against the FCC's need for discovery. The upshot was that its license renewal application was dismissed for failure to comply with the discovery orders.

The FCC began an informal investigation of Faith Center's over-the-air fundraising activities, claiming it had received charges of wire fraud from two disgruntled former church employees. When FCC investigators sought to examine the church's financial records and to question its bookkeeping personnel, Faith Center, after responding in part, claimed in a letter to the FCC that the inquiry sought information protected from government intrusion by the First Amendment's religion clauses. Without receiving any brief on the matter, hearing arguments or conducting an evidentiary hearing, the FCC replied by letter that the church was subject to "the normal scrutiny of the Commission" like any other licensee. When Faith Center continued to assert its constitutional claims, the FCC set its license renewal application for hearing. The issues designated for hearing included the circumstances surrounding the Church's failure to allow Commission access to certain books, records and employees, whether its over-the-air fundraising broadcasts violated the federal wire fraud statute, and, as a con-

sequence, whether renewal of Faith's license would serve the public interest.

When the Broadcast Bureau filed interrogatories and a motion to produce documents, Faith Center filed a brief contending that the discovery requests violated the religion clauses. After hearing arguments, the administrative law judge refused to rule on those constitutional claims and ordered Faith Center to comply with the discovery requests, stating that "if there are religious First Amendment defenses . . . those arguments can be made at the time of the hearing, after the evidence is in." And, in denying permission to appeal that ruling to the FCC, he declared that "Faith will be able to make its Constitutional arguments on the merits during the hearing" and "[t]herefore, such arguments will not lie to bar discovery of the factual situation underlying the allegations in this proceeding."

Faith then appealed to the Court of Appeals for the District of Columbia Circuit, but, at the FCC's urging, the case was dismissed because the interlocutory discovery rulings were not final agency orders appropriate for judicial review. Since no tribunal, administrative or judicial, had ruled on the merits of its religion clause objections to discovery, Faith Center continued to assert them.

As the hearing approached, the FCC filed a second set of interrogatories and a second motion to produce documents which broadened the time period at issue from 13 months to three years and which required disclosure of (1) information relating to all Church projects for which funds had been solicited; (2) records which would specifically identify each and every donor, each and every donation of each and every donor, how each and every donation was spent and each and every unpaid pledge of each and every pledgor; (3) records specifying the amounts of money raised for each church project and the manner in which the funds were

segregated and spent; (4) pastor pertinent records, including the pastor's preaching notes and biblical commentary.

Faith Center reasserted its constitutional claims, but a successor administrative law judge again refused to rule on them, declaring that "[u]nder the law of this case, Faith's constitutional claims will not affect the Bureau discovery" and quoting the previous judge's discovery ruling. He directed Faith Center to respond, warning that failure to comply "may result in the dismissal of its renewal application." Again raising its constitutional claims, Faith unsuccessfully sought to appeal the interlocutory order to the FCC.

Unsatisfied with Faith Center's responses to the second wave of discovery, the Bureau sought an order to show cause why its renewal application should not be dismissed for failure to prosecute. Without ruling on the motion to show cause or considering lesser sanctions, the successor judge, acting on his own motion, dismissed the renewal application for failure to prosecute.

On appeal the FCC held that "Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm," that "[t]herefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders," and that "[a]bsent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery." The FCC repeatedly stressed that it was Faith's continued assertion of its religion clause objections after the Court of Appeals dismissed its interlocutory appeal that warranted dismissal of the renewal application.

First, the FCC declared:

> We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. *Of critical significance* in reaching this conclusion *is Faith's continued failure to respond subsequent to the Court of Appeals' summary dismissal of its appeal on constitutional grounds* on July 13, 1979. At this point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. (Emphasis supplied.)

Second, it asserted that:

> The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the Appeals Court Judges' determination as to the propriety of discovery requests. . . .

Third, it stated:

> While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. *Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application*. However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. (Emphasis added.)

The Court of Appeals for the District of Columbia Circuit summarily affirmed the FCC's order "generally for the reasons given by it" in its opinion.

REASONS FOR GRANTING THE WRIT.

The summary and perfunctory manner in which the FCC treated Faith Center's religion clause contentions in this case raises undecided constitutional questions of fundamental importance to religious liberty, questions which transcend the peculiar boundaries of this case, indeed, questions which are of grave concern to all religions and churches in our society. First, in the era of the "electronic church," the FCC's insistence that it will not vary its "normal scrutiny" of license renewal applications where the licensee is a church —that it is as free to intrude upon the internal affairs of a church as it is upon those of a purely commercial and secular licensee—presents the question whether FCC investigations into the internal affairs of church licensees must meet the rigorous standards this Court has held applicable to other forms of governmental inquiry touching First Amendment interests. Second, if so, the FCC's refusal to assess the competing interests at stake, to weigh the governmental need for discovery against the Church's interests in religious privacy and autonomy, raises the question whether the First Amendment requires the same procedural safeguards for adjudication of religion clause claims that this Court has held must be observed when free speech or associational interests are at stake.

I.

Whether FCC Discovery Orders Intruding Into the Internal Affairs of a Church Licensee Must Satisfy the First Amendment's Compelling-Interest and Least-Restrictive-Alternative Standards Is an Important Constitutional Question.

Faith Center's religion clause claims—objecting to wholesale intrusion on its internal financial affairs, including the privacy of its donors—were more than colorable

and, indeed, substantial. "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations," that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [an] effective . . . restraint on freedom of association," and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *Id.* at 460. For "religious worship and discussion" are "forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 102 S.Ct. 269, 274 (1981).

Not only does the First Amendment shelter the anonymity of an organization's members, *e.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), but also

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[1] "Although past cases have frequently acknowledged that the 'chilling effect' of compelled disclosure most severely affects organizations espousing unorthodox or unpopular views . . . the governing authorities do not support [the] . . . assertion that constitutional protection of anonymity of affiliation is *limited* to members of such groups." *Britt v. Superior Court*, 20 Cal.3d 844, 854, 574 P.2d 766, 143 Cal.Rptr. 695 (1978). Thus, in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963), this Court held that while privacy protections "are all the more essential . . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors," they also extend to "all legitimate organizations." *See Buckley v. Valeo*, 424 U.S. 2, 64-68 (1976) (protection has bearing in case of established political parties); *Pollard v. Roberts*, 283 F.Supp. 248, 258 (E.D. Ark. 1968) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968) (extending protection to Republican Party), *cf. Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Baird v. State Bar*, 401 U.S. 1 (1971). Dissident status, however, may affect the balance in determining whether the government interests in disclosure justify the resulting intrusions on associational privacy. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

"the invasion of privacy of belief may be as great where the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), *quoting California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Indeed, First Amendment protection embraces "private associational information" and "private associational conduct" in general. *See, e.g., Ealy v. Littlejohn*, 569 F.2d 219, 227-31 (5th Cir. 1978) (subject matter of meetings, production of organizational leaflet, printed or oral communications of members, protest activity of members); *Bursey v. United States*, 466 F.2d 1059, 1084-88, *rehearing denied*, 466 F.2d 1090 (9th Cir. 1972) (identities of persons responsible for newspaper and pamphlet publication and distribution and the nature of such activity; identities of persons who associated within organization); *Britt v. Superior Court*, 20 Cal.3d 844, 848, 856, 861, 574 P.2d 766, 143 Cal.Rptr. 695 (1978) (subject matter of organization's meetings); *cf., e.g., United States v. United States District Court*, 407 U.S. 297, 320 (1972) ("Official surveillance [of communications] . . . risks infringement of constitutionally protected privacy of speech"); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

There should be no doubt that the FCC's discovery orders "penetrate[d] deeply into the internal affairs" of the church. *See Larson v. Valente*, 102 S.Ct. 1673, 1688 n. 29 (1982). "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas." *Gibson*, 372 U.S. at 558, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality opinion). Because private associational affairs are "pre-

sumptively protected by the First Amendment," *e.g., Bursey v. United States*, 466 F.2d at 1082 & cases there cited, they "are presumptively immune from inquisition." *See e.g., Sweezy v. New Hampshire*, 354 U.S. at 266 (Frankfurter, J., concurring); *Britt v. Superior Court*, 20 Cal.3d at 855; *cf., e.g., Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude,' " for such materials are "presumptively protected").

Thus, the Court has promulgated strict standards governing compelled disclosure of private associational matters. The party seeking disclosure bears the heavy burden of demonstrating that it is justified by "a subordinating interest which is compelling." *E.g., Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). "The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information," for "[v]alidation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 545. The party urging disclosure must therefore "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *id.* at 546, and this showing "must survive exacting scrutiny." *Buckley v. Valeo, supra*, 424 U.S. at 64. Finally, it must be shown that "the incidental infringement upon First Amendment rights is no greater than is essential to vindicate [the] . . . subordinating interests," *Bursey v. United States*, 466 F.2d at 1083, for those interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the

end can be more narrowly achieved." *E.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Hence, governmental investigation that chills expression "must be highly selective in order to survive challenge under the First Amendment." *See, e.g., Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

Perhaps because privacy and anonymity have played an important role in the history of religious liberty, *see Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Talley v. California*, 362 U.S. 60, 64-65 (1960), the courts have enforced these First Amendment standards especially meticulously where compelled disclosure of private religious matters is sought. *See, e.g., Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78-80 (1st Cir. 1979) (striking down administrative subpoena requiring production of financial records of Catholic schools because government had not borne burden of fully justifying resulting burden on free exercise of religion). In *Fernandes v. Limmer*, 465 F.Supp. 493, 504 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 51 U.S.L.W. 3174 (September 7, 1982), the court, striking down a local ordinance insofar as it required churches engaged in soliciting funds to submit to examination of their financial records, observed:

> No Church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the [church] and deal with it financially is great, as is the impact [on] the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside.

That even the most superficial and tentative inquiry into religious affairs trespasses on First Amendment protected ground is shown by *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the National Labor Relations Act did not cover teachers in church-operated schools. Construing the Act to avoid serious constitutional questions, the Court observed that if the Act embraced religious schools, "the very process of inquiry leading to findings and conclusions" in unfair labor practice proceedings "may impinge on rights guaranted by the Religion Clauses." 440 U.S. at 502. And it added that "[t]his kind of inquiry and its sensitivity" were "illustrated" by a hearing in which a monsignor was merely asked how many liturgies and masses are required at Catholic parochial high schools. *Id.* at 502 n. 10, 507-08; *see Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (terming, "burdensome and inquisitorial" an examination of religious dissenter conducted prior to licensing of public distribution of literature); *McCormick v. Hirsch*, 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) ("The reach of the investigatory powers [of the NLRB] into the financial affairs of the Church obviously creates the potential for breach of religious liberty").

These First Amendment standards carry full force when disclosure is compelled pursuant to a discovery order in civil litigation. *See Hastings v. North East Independent School Dist.*, 615 F.2d 628 (5th Cir. 1980); *UAW v. Nat'l Right to Work Legal Defense and Educ. Fund*, 590 F.2d 1139 (D.C. Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976); *Britt v. Superior Court*, 20 Cal.3d 844; *cf. Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th

Cir. 1978); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment Co.*, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). This Court's decision in the *Alabama* case establishes that proposition beyond question, for the compelled disclosure there had been embodied in a discovery order issued in a civil lawsuit. "Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." *Britt*, 20 Cal.3d at 857; *see Carey v. Hume*, 492 F.2d at 636.

The FCC's contention that it may exercise its investigatory and inquisitorial powers against Church licensees as freely and broadly as against licensees which do not fall within the First Amendment mantle is, in essence, a claim that it, unlike other governmental agencies, enjoys a special exemption from traditional First Amendment standards. The FCC's power to regulate licensees in the public interest "cannot be invoked as a talismanic incantation to support any exercise of power which can be brought within its ambit" where First Amendment interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) ("war power"). "That the effective exercise of First Amendment rights may undercut a given government's policy on some issues is, indeed, one of the purposes of those rights." *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667, 670 (7th Cir. 1979). The very premise of the First Amendment is that the Government, including the FCC, must regulate churches and religions differently—

more sensitively and only on greater justification—than purely secular entities. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).[2] Moreover, that an FCC license is a benefit or privilege—a matter of grace rather than a constitutional right—does not exempt FCC intrusions into private religious affairs from First Amendment scrutiny, for "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *E.g., Sherbert v. Verner*, 374 U.S. at 404.

Since the FCC in its original letter to Faith Center stated that the Church was, like any other licensee, subject to "the normal scrutiny of the Commission," the administrative law judges held that Faith's religion clause claims were not assertable during discovery proceedings. Hence they did not apply the traditional First Amendment standards in compelling Faith Center to respond to the discovery requests; indeed, they simply did not weigh Faith's constitutional claims.

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[2]The FCC's holding that to accord favored treatment to Church licensees "would raise serious constitutional problems in itself" and that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture" is specious. "The dual prohibition" of the religion clauses distinguishes "the sphere of religious activity . . . from the secular intellectual liberties," and "legal restrictions cannot be applied to religious practices, as they can in much of the secular realm, merely on a showing of a rational relationship between the regulation imposed and the legitimate end sought." *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1155 (D.C. Cir. 1969). Courts have held that religions are entirely exempt from some governmental regulatory schemes. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. at 506-07; *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 117-19 (1952); *Surinach v. Pesquera de Busquets*, 604 F.2d at 76-80; *The Kings Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974). Relieving a church from a governmental burden under the free exercise clause thus simply does not violate the establishment clause. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 411 (1963).

The resulting orders compelling disclosure—violation of which served as the critical basis for the dismissal of Faith's renewal application—thus suffered constitutional defects arising from a profound failure to subject the Broadcast Bureau's need for the discovery to the required "exacting scrutiny." *See, e.g., Buckley v. Valeo*, 421 U.S. at 64. First, the Bureau was not required to show the relevance of the information sought, to demonstrate that it went to "the heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d at 713; *UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *Carey v. Hume*, 492 F.2d at 636. Quite the contrary, the FCC's opinion reversed the burden of proof on this score; it noted that "Faith has not demonstrated that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." The Bureau thus was not required to describe the information it hoped to obtain and its importance to its case with reasonable specificity, but was allowed to proceed on the impermissible basis of mere speculation that the information might be useful. *See Cervantes v. Time, Inc.*, 464 F.2d at 994; *Pollard v. Roberts*, 283 F.Supp. at 257; *cf., e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224-25, 227 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963).

Second, the Bureau was not required to demonstrate that it had exhausted every reasonable alternative source of the information it sought by discovery directed at the church. *See UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *cf., Zerilli v. Smith*, 656 F.2d at 713; *Carey v. Hume*, 492 F.2d at 639; *Riley v. City of Chester*, 612 F.2d at 717-18; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d at 430; *Baker v. F & F Investment Co.*, 470 F.2d at 784; *Miller v. Transamerican Press, Inc.*, 621 F.2d at 726. The compulsion orders thus violated the principle that where First Amendment interests are at stake, "compelled disclosure * * *

[is] normally the end and not the beginning of the inquiry." *See Zerilli v. Smith*, 656 F.2d at 713, *quoting Carey v. Hume*, 492 F.2d at 638.

While the Government must satisfy these compelling-interest and least-restrictive-alternative requirements whenever compelled disclosure intrudes upon the privacy of any presumptively protected association, *see supra*, n. 1, the association is, as this court held just last month, entitled to show particular circumstances which diminish the governmental interests in the disclosure and/or increase the disclosure's potential for impairing First Amendment interests and which thus alter the balance to be drawn. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982). Hence the administrative law judge's rulings that Faith Center could not raise its First Amendment claims at the discovery stage suffered a third constitutional defect: they deprived Faith Center of the opportunity to show particular circumstances increasing the burden of justification the Broadcast Bureau bore. *See id.*[3] This defect alone warrants vacation of the Court of Appeals' decision and remand for reconsideration of this case in the light of *Brown*.

The administrative law judges' abnegation of their constitutional duty thus put Faith Center in the unconscionable dilemma of foregoing its religious privacy objections—claims never adjudicated or ruled upon—or insisting on its rights to a ruling on those objections, thus courting dismissal

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[3]Unorthodox religions are, of course, still subjected to widespread public condemnation as "cults" threatening established social values, and it is entirely conceivable that, given the opportunity, Faith Center could "show a 'reasonable probability' that the compelled disclosures will subject [its contributors and recipients of its disbursements] . . . to 'threats, harassment, or reprisals.' " *Brown*, 51 U.S.L.W. 4015, *quoting Buckley*, 424 U.S. at 74.

of its renewal application and loss of its television station.[4] Their promise that constitutional claims could be raised after discovery and the production of evidence was an empty one. For it ignored the undeniable fact that the constitutional damage—the compelled exposure of private religious matters in violation of the free exercise clause—occurs at the precise moment the disclosure takes place. That damage is, of course, irreparable, for no matter what the judge later does, he cannot undo the constitutional wrongs already wrought. The injury is worked by the compelled disclosure; the only remedy is to prevent that disclosure in the first instance, and that requires an immediate ruling on the merits of the constitutional claim.

The administrative law judges' failure to rule on Faith's constitutional claims ignores the Court's recognition that the procedures by which First Amendment claims are evaluated and resolved "assume an importance fully as great as the validity of the substantive rule of law to be applied" and that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Hence, the Court has constructed a "First Amendment 'due proces' "—"a series of specific rules designed to prevent insensitive procedural devices from strangling First Amendment interests." Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). Governmental intrusions upon interests in freedom of expression must "embody the most rigorous procedural

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[4]Contrary to the FCC's opinion, the Court of Appeals' summary dismissal of Faith Center's appeal because it was interlocutory could not and did not "finally put to rest" its constitutional claims regarding the propriety of discovery and thus did not "clearly put [it] on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination." Faith has yet to receive any ruling on the merits of its constitutional objections to discovery.

safeguards" because that freedom is "vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), and compelled disclosure of associational matters constitutes a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. at 64.

Governmental restraint or seizure of expression must be preceded by an adversary judicial determination that it is not constitutionally prohibited.[5] *See e.g., Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965). Compelled disclosure of private associational matters constitutes an "effective restraint" on freedom of association, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, and it, too, should be preceded by an adversary determination of its constitutional validity.

Faith Center's constitutional claims, then, did not receive the due process the First Amendment commands. In the absence of a prior adversary determination of those claims, based on meticulous scrutiny of the Bureau's showing of its *need* for discovery, the orders compelling disclosure and the resulting dismissal of the renewal application are constitutionally invalid.[6] *See e.g., UAW v. Nat'l Right to Work*, 590 F.2d at 1153.

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[5]An exception is made for restraints or seizures of alleged obscenity, but even there they must be followed by a prompt adversary judicial determination of their constitutionality. *See e.g., Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965).

[6]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, it is clear that the FCC deemed this continued assertion "[o]f critical significance in reaching" the conclusion that the renewal application should be dismissed for failure to comply with discovery orders. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: January 25, 1983.

Respectfully submitted,

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Counsel of Record for Amicus.

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No. 82-867
IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF FULL GOSPEL FELLOWSHIP OF CHURCHES AND MINISTERS, INTERNATIONAL AND WESCOTT CHRISTIAN CENTER, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No. 82-867

IN THE

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FAITH CENTER, INC.,

Petitioner,

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FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF FULL GOSPEL FELLOWSHIP OF CHURCHES AND MINISTERS, INTERNATIONAL AND WESCOTT CHRISTIAN CENTER, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Interest of Amicus.

The Full Gospel Fellowship of Churches and Ministers, International has over 2,000 member churches and over 2 million members. Wescott Christian Church, one of the 2,000 member churches and a sister church of the petitioner, Faith Center, Inc., antedating the latter by several years, has its headquarters in Oroville, California.

It is axiomatic to non-profit corporation law that the founding charter, statement of purposes, constitution, and by-laws of such a corporation determine the nature of its organization. The Full Gospel Fellowship is properly ac-

credited by the Internal Revenue Service as a parent body association of churches. Wescott and the petitioner are properly listed as separate and distinct member organizations and subordinate units. The petitioner, however, is congregational in polity whereas Wescott is hierarchical. Churches of such differing polity in legally recognized forms of organization are separate and distinct.

Throughout the proceedings of the respondent now sought to be reviewed before this Court, the respondent has sought to use its asserted control over the petitioner, Faith Center, Inc., to force the latter to provide the respondent with detailed and sensitive information concerning the inner workings and financial affairs of both the Full Gospel Fellowship and Wescott. Not only does this violate the Religion Clauses, and in particular, *Jones v. Wolf*, 443 U.S. 595, 61 L.Ed. 2d 775, 99 S.Ct. 3020, but the result is particularly onerous when it is noted that the neither of the latter organizations have been a party before any F.C.C. proceeding. Such a result not only violates the First Amendment rights of their respective members, but the rights of the organizations themselves to associate, equally deserving of the First Amendment protection.

If, as the respondent would have it, the price of a televised religious ministry is that the respondent may delve into the financial affairs of not only a church licensee but the financial affairs of sister churches and their parent organizations, a Supreme Court declaration on the matter is warranted. If the respondent's position is correct, if a subordinate organization of the Catholic church owned a television license, the FCC has the right to delve into the personal finances of the Pope, and demand access into every Catholic organization worldwide by virtue of the ecclesiastical unity and interconnections of the Catholic organization.

Copies of letters containing consent to the filing hereof are filed with the Clerk of the Court.

This case—in which the Federal Communications Commission dismissed a church's television license renewal application because it did not comply with broad discovery orders seeking information about internal church affairs—is of particular concern to the amicus. For, if religion is to survive in the modern day, avenues of religious communication must remain as varied and broad as possible and religious privacy and autonomy must remain inviolate from governmental intrusions.

This case transcends in importance the immediate interests of the particular church involved as a litigant, for it carries consequences for religious freedoms generally. And it is from the perspective of these more general interests in religious freedom that the amicus put this brief before the Court.

Statement of the Case.

Faith Center, Inc., a Christian church which holds a television station operating license, and the Federal Communications Commission (FCC) came to loggerheads over a question of religious liberty. Faith Center claimed that FCC discovery requests, made in a license renewal proceeding and seeking broad disclosure of its financial records, intruded upon religious privacy in violation of the free exercise clause and entangled the Government in religious affairs in violation of the establishment clause, and it insisted that the FCC should weigh and rule on those claims before compelling it to comply. The FCC, however, insisted that the fact that the licensee was a church did not place it "beyond the normal scrutiny of the Commission," and it therefore found no need to assess Faith Center's First Amendment claims. Faith Center nevertheless persisted in its contention

that the FCC should balance its interests in religious liberty against the FCC's need for discovery. The upshot was that its license renewal application was dismissed for failure to comply with the discovery orders.

The FCC began an informal investigation of Faith Center's over-the-air fundraising activities, claiming it had received charges of wire fraud from two disgruntled former church employees. When FCC investigators sought to examine the church's financial records and to question its bookkeeping personnel, Faith Center, after responding in part, claimed in a letter to the FCC that the inquiry sought information protected from government intrusion by the First Amendment's religion clauses. Without receiving any brief on the matter, hearing arguments or conducting an evidentiary hearing, the FCC replied by letter that the church was subject to "the normal scrutiny of the Commission" like any other licensee. When Faith Center continued to assert its constitutional claims, the FCC set its license renewal application for hearing. The issues designated for hearing included the circumstances surrounding the Church's failure to allow Commission access to certain books, records and employees, whether its over-the-air fundraising broadcasts violated the federal wire fraud statute, and, as a consequence, whether renewal of Faith's license would serve the public interest.

When the Broadcast Bureau filed interrogatories and a motion to produce documents, Faith Center filed a brief contending that the discovery requests violated the religion clauses. After hearing arguments, the administrative law judge refused to rule on those constitutional claims and ordered Faith Center to comply with the discovery requests, stating that "if there are religious First Amendment defenses . . . those arguments can be made at the time of the hearing, after the evidence is in." And, in denying permission to

appeal that ruling to the FCC, he declared that "Faith will be able to make its Constitutional arguments on the merits during the hearing" and "[t]herefore, such arguments will not lie to bar discovery of the factual situation underlying the allegations in this proceeding."

Faith then appealed to the Court of Appeals for the District of Columbia Circuit, but, at the FCC's urging, the case was dismissed because the interlocutory discovery rulings were not final agency orders appropriate for judicial review. Since no tribunal, administrative or judicial, had ruled on the merits of its religion clause objections to discovery, Faith Center continued to assert them.

As the hearing approached, the FCC filed a second set of interrogatories and a second motion to produce documents which broadened the time period at issue from 13 months to three years and which required disclosure of (1) information relating to all Church projects for which funds had been solicited; (2) records which would specifically identify each and every donor, each and every donation of each and every donor, how each and every donation was spent and each and every unpaid pledge of each and every pledgor; (3) records specifying the amounts of money raised for each church project and the manner in which the funds were segregated and spent; (4) pastor pertinent records, including the pastor's preaching notes and biblical commentary.

Faith Center reasserted its constitutional claims, but a successor administrative law judge again refused to rule on them, declaring that "[u]nder the law of this case, Faith's constitutional claims will not affect the Bureau discovery" and quoting the previous judge's discovery ruling. He directed Faith Center to respond, warning that failure to comply "may result in the dismissal of its renewal application." Again raising its constitutional claims, Faith unsuccessfully sought to appeal the interlocutory order to the FCC.

Unsatisfied with Faith Center's responses to the second wave of discovery, the Bureau sought an order to show cause why its renewal application should not be dismissed for failure to prosecute. Without ruling on the motion to show cause or considering lesser sanctions, the successor judge, acting on his own motion, dismissed the renewal application for failure to prosecute.

On appeal the FCC held that "Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm," that "[t]herefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders," and that "[a]bsent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery." The FCC repeatedly stressed that it was Faith's continued assertion of its religion clause objections after the Court of Appeals dismissed its interlocutory appeal that warranted dismissal of the renewal application.

First, the FCC declared:

> We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. *Of critical significance* in reaching this conclusion *is Faith's continued failure to respond subsequent to the Court of Appeals' summary dismissal of its appeal on constitutional grounds* on July 13, 1979. At this point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. (Emphasis supplied.)

Second, it asserted that:

> The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the Appeals Court Judges' determination as to the propriety of discovery requests. . . .

Third, it stated:

> While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. *Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application.* However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. (Emphasis added.)

The Court of Appeals for the District of Columbia Circuit summarily affirmed the FCC's order "generally for the reasons given by it" in its opinion.

REASONS FOR GRANTING THE WRIT.

The summary and perfunctory manner in which the FCC treated Faith Center's religion clause contentions in this case raises undecided constitutional questions of fundamental importance to religious liberty, questions which transcend the peculiar boundaries of this case, indeed, questions which are of grave concern to all religions and churches in our society. First, in the era of the "electronic church," the FCC's insistence that it will not vary its "normal scrutiny" of license renewal applications where the licensee is a church —that it is as free to intrude upon the internal affairs of a church as it is upon those of a purely commercial and secular licensee—presents the question whether FCC investigations into the internal affairs of church licensees must meet the rigorous standards this Court has held applicable to other forms of governmental inquiry touching First Amendment interests. Second, if so, the FCC's refusal to assess the competing interests at stake, to weigh the governmental need for discovery against the Church's interests in religious privacy and autonomy, raises the question whether the First Amendment requires the same procedural safeguards for adjudication of religion clause claims that this Court has held must be observed when free speech or associational interests are at stake.

I.

Whether FCC Discovery Orders Intruding Into the Internal Affairs of a Church Licensee Must Satisfy the First Amendment's Compelling-Interest and Least-Restrictive-Alternative Standards Is an Important Constitutional Question.

Faith Center's religion clause claims—objecting to wholesale intrusion on its internal financial affairs, including the privacy of its donors—were more than colorable

and, indeed, substantial. "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations," that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [an] effective . . . restraint on freedom of association," and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *Id.* at 460. For "religious worship and discussion" are "forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 102 S.Ct. 269, 274 (1981).

Not only does the First Amendment shelter the anonymity of an organization's members, *e.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), but also

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[1] "Although past cases have frequently acknowledged that the 'chilling effect' of compelled disclosure most severely affects organizations espousing unorthodox or unpopular views . . . the governing authorities do not support [the] . . . assertion that constitutional protection of anonymity of affiliation is *limited* to members of such groups." *Britt v. Superior Court*, 20 Cal.3d 844, 854, 574 P.2d 766, 143 Cal.Rptr. 695 (1978). Thus, in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963), this Court held that while privacy protections "are all the more essential . . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors," they also extend to "all legitimate organizations." *See Buckley v. Valeo*, 424 U.S. 2, 64-68 (1976) (protection has bearing in case of established political parties); *Pollard v. Roberts*, 283 F.Supp. 248, 258 (E.D. Ark. 1968) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968) (extending protection to Republican Party); *cf. Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Baird v. State Bar*, 401 U.S. 1 (1971). Dissident status, however, may affect the balance in determining whether the government interests in disclosure justify the resulting intrusions on associational privacy. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

"the invasion of privacy of belief may be as great where the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), *quoting California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Indeed, First Amendment protection embraces "private associational information" and "private associational conduct" in general. *See, e.g., Ealy v. Littlejohn*, 569 F.2d 219, 227-31 (5th Cir. 1978) (subject matter of meetings, production of organizational leaflet, printed or oral communications of members, protest activity of members); *Bursey v. United States*, 466 F.2d 1059, 1084-88, *rehearing denied*, 466 F.2d 1090 (9th Cir. 1972) (identities of persons responsible for newspaper and pamphlet publication and distribution and the nature of such activity; identities of persons who associated within organization); *Britt v. Superior Court*, 20 Cal.3d 844, 848, 856, 861, 574 P.2d 766, 143 Cal.Rptr. 695 (1978) (subject matter of organization's meetings); *cf., e.g., United States v. United States District Court*, 407 U.S. 297, 320 (1972) ("Official surveillance [of communications] . . . risks infringement of constitutionally protected privacy of speech"); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

There should be no doubt that the FCC's discovery orders "penetrate[d] deeply into the internal affairs" of the church. *See Larson v. Valente*, 102 S.Ct. 1673, 1688 n. 29 (1982). "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas." *Gibson*, 372 U.S. at 558, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality opinion). Because private associational affairs are "pre-

sumptively protected by the First Amendment," *e.g.*, *Bursey v. United States*, 466 F.2d at 1082 & cases there cited, they "are presumptively immune from inquisition." *See e.g.*, *Sweezy v. New Hampshire*, 354 U.S. at 266 (Frankfurter, J., concurring); *Britt v. Superior Court*, 20 Cal.3d at 855; *cf.*, *e.g.*, *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude,' " for such materials are "presumptively protected").

Thus, the Court has promulgated strict standards governing compelled disclosure of private associational matters. The party seeking disclosure bears the heavy burden of demonstrating that it is justified by "a subordinating interest which is compelling." *E.g.*, *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). "The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information," for "[v]alidation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 545. The party urging disclosure must therefore "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *id.* at 546, and this showing "must survive exacting scrutiny." *Buckley v. Valeo*, *supra*, 424 U.S. at 64. Finally, it must be shown that "the incidental infringement upon First Amendment rights is no greater than is essential to vindicate [the] . . . subordinating interests," *Bursey v. United States*, 466 F.2d at 1083, for those interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the

end can be more narrowly achieved." *E.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Hence, governmental investigation that chills expression "must be highly selective in order to survive challenge under the First Amendment." *See, e.g., Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

Perhaps because privacy and anonymity have played an important role in the history of religious liberty, *see Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Talley v. California*, 362 U.S. 60, 64-65 (1960), the courts have enforced these First Amendment standards especially meticulously where compelled disclosure of private religious matters is sought. *See, e.g., Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78-80 (1st Cir. 1979) (striking down administrative subpoena requiring production of financial records of Catholic schools because government had not borne burden of fully justifying resulting burden on free exercise of religion). In *Fernandes v. Limmer*, 465 F.Supp. 493, 504 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 51 U.S.L.W. 3174 (September 7, 1982), the court, striking down a local ordinance insofar as it required churches engaged in soliciting funds to submit to examination of their financial records, observed:

> No Church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the [church] and deal with it financially is great, as is the impact [on] the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside.

That even the most superficial and tentative inquiry into religious affairs trespasses on First Amendment protected ground is shown by *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the National Labor Relations Act did not cover teachers in church-operated schools. Construing the Act to avoid serious constitutional questions, the Court observed that if the Act embraced religious schools, "the very process of inquiry leading to findings and conclusions" in unfair labor practice proceedings "may impinge on rights guaranted by the Religion Clauses." 440 U.S. at 502. And it added that "[t]his kind of inquiry and its sensitivity" were "illustrated" by a hearing in which a monsignor was merely asked how many liturgies and masses are required at Catholic parochial high schools. *Id.* at 502 n. 10, 507-08; *see Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (terming, "burdensome and inquisitorial" an examination of religious dissenter conducted prior to licensing of public distribution of literature); *McCormick v. Hirsch*, 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) ("The reach of the investigatory powers [of the NLRB] into the financial affairs of the Church obviously creates the potential for breach of religious liberty").

These First Amendment standards carry full force when disclosure is compelled pursuant to a discovery order in civil litigation. *See Hastings v. North East Independent School Dist.*, 615 F.2d 628 (5th Cir. 1980); *UAW v. Nat'l Right to Work Legal Defense and Educ. Fund*, 590 F.2d 1139 (D.C. Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976); *Britt v. Superior Court*, 20 Cal.3d 844; *cf. Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th

Cir. 1978); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment Co.*, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). This Court's decision in the *Alabama* case establishes that proposition beyond question, for the compelled disclosure there had been embodied in a discovery order issued in a civil lawsuit. "Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." *Britt*, 20 Cal.3d at 857; *see Carey v. Hume*, 492 F.2d at 636.

The FCC's contention that it may exercise its investigatory and inquisitorial powers against Church licensees as freely and broadly as against licensees which do not fall within the First Amendment mantle is, in essence, a claim that it, unlike other governmental agencies, enjoys a special exemption from traditional First Amendment standards. The FCC's power to regulate licensees in the public interest "cannot be invoked as a talismanic incantation to support any exercise of power which can be brought within its ambit" where First Amendment interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) ("war power"). "That the effective exercise of First Amendment rights may undercut a given government's policy on some issues is, indeed, one of the purposes of those rights." *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667, 670 (7th Cir. 1979). The very premise of the First Amendment is that the Government, including the FCC, must regulate churches and religions differently—

more sensitively and only on greater justification—than purely secular entities. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).[2] Moreover, that an FCC license is a benefit or privilege—a matter of grace rather than a constitutional right—does not exempt FCC intrusions into private religious affairs from First Amendment scrutiny, for "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *E.g., Sherbert v. Verner*, 374 U.S. at 404.

Since the FCC in its original letter to Faith Center stated that the Church was, like any other licensee, subject to "the normal scrutiny of the Commission," the administrative law judges held that Faith's religion clause claims were not assertable during discovery proceedings. Hence they did not apply the traditional First Amendment standards in compelling Faith Center to respond to the discovery requests; indeed, they simply did not weigh Faith's constitutional claims.

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[2]The FCC's holding that to accord favored treatment to Church licensees "would raise serious constitutional problems in itself" and that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture" is specious. "The dual prohibition" of the religion clauses distinguishes "the sphere of religious activity . . . from the secular intellectual liberties," and "legal restrictions cannot be applied to religious practices, as they can in much of the secular realm, merely on a showing of a rational relationship between the regulation imposed and the legitimate end sought." *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1155 (D.C. Cir. 1969). Courts have held that religions are entirely exempt from some governmental regulatory schemes. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. at 506-07; *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 117-19 (1952); *Surinach v. Pesquera de Busquets*, 604 F.2d at 76-80; *The Kings Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974). Relieving a church from a governmental burden under the free exercise clause thus simply does not violate the establishment clause. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 411 (1963).

The resulting orders compelling disclosure—violation of which served as the critical basis for the dismissal of Faith's renewal application—thus suffered constitutional defects arising from a profound failure to subject the Broadcast Bureau's need for the discovery to the required "exacting scrutiny." *See, e.g., Buckley v. Valeo*, 421 U.S. at 64. First, the Bureau was not required to show the relevance of the information sought, to demonstrate that it went to "the heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d at 713; *UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *Carey v. Hume*, 492 F.2d at 636. Quite the contrary, the FCC's opinion reversed the burden of proof on this score; it noted that "Faith has not demonstrated that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." The Bureau thus was not required to describe the information it hoped to obtain and its importance to its case with reasonable specificity, but was allowed to proceed on the impermissible basis of mere speculation that the information might be useful. *See Cervantes v. Time, Inc.*, 464 F.2d at 994; *Pollard v. Roberts*, 283 F.Supp. at 257; *cf., e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224-25, 227 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963).

Second, the Bureau was not required to demonstrate that it had exhausted every reasonable alternative source of the information it sought by discovery directed at the church. *See UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *cf., Zerilli v. Smith*, 656 F.2d at 713; *Carey v. Hume*, 492 F.2d at 639; *Riley v. City of Chester*, 612 F.2d at 717-18; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d at 430; *Baker v. F & F Investment Co.*, 470 F.2d at 784; *Miller v. Transamerican Press, Inc.*, 621 F.2d at 726. The compulsion orders thus violated the principle that where First Amendment interests are at stake, "compelled disclosure * * *

[is] normally the end and not the beginning of the inquiry." *See Zerilli v. Smith*, 656 F.2d at 713, *quoting Carey v. Hume*, 492 F.2d at 638.

While the Government must satisfy these compelling-interest and least-restrictive-alternative requirements whenever compelled disclosure intrudes upon the privacy of any presumptively protected association, *see supra*, n. 1, the association is, as this court held just last month, entitled to show particular circumstances which diminish the governmental interests in the disclosure and/or increase the disclosure's potential for impairing First Amendment interests and which thus alter the balance to be drawn. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982). Hence the administrative law judge's rulings that Faith Center could not raise its First Amendment claims at the discovery stage suffered a third constitutional defect: they deprived Faith Center of the opportunity to show particular circumstances increasing the burden of justification the Broadcast Bureau bore. *See id.*[3] This defect alone warrants vacation of the Court of Appeals' decision and remand for reconsideration of this case in the light of *Brown*.

The administrative law judges' abnegation of their constitutional duty thus put Faith Center in the unconscionable dilemma of foregoing its religious privacy objections—claims never adjudicated or ruled upon—or insisting on its rights to a ruling on those objections, thus courting dismissal

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[3]Unorthodox religions are, of course, still subjected to widespread public condemnation as "cults" threatening established social values, and it is entirely conceivable that, given the opportunity, Faith Center could "show a 'reasonable probability' that the compelled disclosures will subject [its contributors and recipients of its disbursements] . . . to 'threats, harassment, or reprisals.' " *Brown*, 51 U.S.L.W. 4015, *quoting Buckley*, 424 U.S. at 74.

of its renewal application and loss of its television station.[4] Their promise that constitutional claims could be raised after discovery and the production of evidence was an empty one. For it ignored the undeniable fact that the constitutional damage—the compelled exposure of private religious matters in violation of the free exercise clause—occurs at the precise moment the disclosure takes place. That damage is, of course, irreparable, for no matter what the judge later does, he cannot undo the constitutional wrongs already wrought. The injury is worked by the compelled disclosure; the only remedy is to prevent that disclosure in the first instance, and that requires an immediate ruling on the merits of the constitutional claim.

The administrative law judges' failure to rule on Faith's constitutional claims ignores the Court's recognition that the procedures by which First Amendment claims are evaluated and resolved "assume an importance fully as great as the validity of the substantive rule of law to be applied" and that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Hence, the Court has constructed a "First Amendment 'due proces' "—"a series of specific rules designed to prevent insensitive procedural devices from strangling First Amendment interests." Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). Governmental intrusions upon interests in freedom of expression must "embody the most rigorous procedural

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[4]Contrary to the FCC's opinion, the Court of Appeals' summary dismissal of Faith Center's appeal because it was interlocutory could not and did not "finally put to rest" its constitutional claims regarding the propriety of discovery and thus did not "clearly put [it] on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination." Faith has yet to receive any ruling on the merits of its constitutional objections to discovery.

safeguards" because that freedom is "vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), and compelled disclosure of associational matters constitutes a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. at 64.

Governmental restraint or seizure of expression must be preceded by an adversary judicial determination that it is not constitutionally prohibited.[5] *See e.g., Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965). Compelled disclosure of private associational matters constitutes an "effective restraint" on freedom of association, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, and it, too, should be preceded by an adversary determination of its constitutional validity.

Faith Center's constitutional claims, then, did not receive the due process the First Amendment commands. In the absence of a prior adversary determination of those claims, based on meticulous scrutiny of the Bureau's showing of its *need* for discovery, the orders compelling disclosure and the resulting dismissal of the renewal application are constitutionally invalid.[6] *See e.g., UAW v. Nat'l Right to Work*, 590 F.2d at 1153.

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[5]An exception is made for restraints or seizures of alleged obscenity, but even there they must be followed by a prompt adversary judicial determination of their constitutionality. *See e.g., Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965).

[6]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, it is clear that the FCC deemed this continued assertion "[o]f critical significance in reaching" the conclusion that the renewal application should be dismissed for failure to comply with discovery orders. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: January 25, 1983.

Respectfully submitted,

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No. 82-867

IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF NEW MOUNT PLEASANT MISSIONARY BAPTIST CHURCH, NEW STAR OF BETHLEHEM AND APPLIED RELIGION CENTER, AMICI CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Interest of Amici.

The New Mount Pleasant Missionary Baptist Church and the New Star of Bethlehem, both of Los Angeles, California, and the Applied Religion Center, Burbank, California, are each nonprofit religious organizations incorporated under the laws of the State of California. They have received the consent of the parties to the case to the filing of this brief, and copies of letters containing that consent are filed with the Clerk of the Court contemporaneously with this brief.

As religious organizations, the amici are concerned with the scope of the protection the First Amendment's religion

clauses afford against governmental intrusions into internal church affairs. Moreover, as comparatively small religious groups, they are concerned that means of religious communication remain as open as possible. This case — in which the Federal Communications Commission has dismissed a church's television license renewal application because it did not comply with broad discovery orders to divulge information about internal church matters — implicates both those concerns.

In addition, it should be noted that the New Mount Pleasant Missionary Baptist Church, an inner-city church in Los Angeles, California, has on several occasions received free television time from Faith Center, Inc. to air its views and concerns to an audience it would otherwise be unable to reach.

Brief.

The amici join and adopt the amicus curiae brief already filed in this case by the Church of Scientology of California, Inc. *See* R. Stern & E. Gressman, *Supreme Court Practice* 728 (5th ed. 1978).

Conclusion.

For the reasons set forth in that brief, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

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Respectfully submitted,

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I.

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No. 82-867
IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Interest of Amicus.

The Commonwealth of the Northern Mariana Islands has received the consent of the parties to the case to the filing of this brief, *amicus curiae*, and copies of letters containing that consent are filed with the Clerk of the Court herewith.

Amicus is a self-governing Commonwealth in political union with and under the sovereignty of the United States of America (Title 48 U.S.C. §1681 Article I). The protections extended to citizens of the United States under Article

IV and Amendments 1-9, inclusive, of the Constitution of the United States are likewise extended to the citizens of the Commonwealth (Title 48 U.S.C. §1681 Article V).

The instant case — in which the Federal Communications Commission dismissed the license renewal application of a church operated television station because the church refused to comply with discovery orders seeking information regarding donor's records and other internal church affairs — is of great concern to the citizens of the Commonwealth who cherish not only their long history of active Christianity, but their newly-affirmed rights to free exercise of religion and due process of law. The Commonwealth is especially interested in this action since a large part of its link with the United States consists of television programs which originate in the Los Angeles area and are rebroadcast from the Territory of Guam. Thus, the disposition of this case will materially affect the content and control of the Islands' "window on the world" as well and the serious questions of religious freedom and due process of law addressed by the case.

Statement of the Case.

Faith Center, Inc., a Christian church which holds a television station operating license, and the Federal Communications Commission (FCC) came to loggerheads over a question of religious liberty. Faith Center claimed that FCC discovery requests, made in a license renewal proceeding and seeking broad disclosure of its financial records, intruded upon religious privacy in violation of the free exercise clause and entangled the Government in religious affairs in violation of the establishment clause, and it insisted that the FCC should weigh and rule on those claims before compelling it to comply. The FCC, however, insisted that the fact that the licensee was a church did not place it "beyond

the normal scrutiny of the Commission," and it therefore found no need to assess Faith Center's First Amendment claims. Faith Center nevertheless persisted in its contention that the FCC should balance its interests in religious liberty against the FCC's need for discovery. The upshot was that its license renewal application was dismissed for failure to comply with the discovery orders.

The FCC began an informal investigation of Faith Center's over-the-air fundraising activities, claiming it had received charges of wire fraud from two disgruntled former church employees. When FCC investigators sought to examine the church's financial records and to question its bookkeeping personnel, Faith Center, after responding in part, claimed in a letter to the FCC that the inquiry sought information protected from governmental intrusion by the First Amendment's religion clauses. Without receiving any brief on the matter, hearing arguments or conducting an evidentiary hearing, the FCC replied by letter that the church was subject to "the normal scrutiny of the Commission" like any other licensee. When Faith Center continued to assert its constitutional claims, the FCC set its license renewal application for hearing. The issues designated for hearing included the circumstances surrounding the Church's failure to allow Commission access to certain books, records and employees, whether its over-the-air fundraising broadcasts violated the federal wire fraud statute, and, as a consequence, whether renewal of Faith's license would serve the public interest.

When the Broadcast Bureau filed interrogatories and a motion to produce documents, Faith Center filed a brief contending that the discovery requests violated the religion clauses. After hearing arguments, the administrative law judge refused to rule on those constitutional claims and ordered Faith Center to comply with the discovery requests, stating that "if there are religious First Amendment defenses . . . those arguments can be made at the time of the hearing,

after the evidence is in." And, in denying permission to appeal that ruling to the FCC, he declared that "Faith will be able to make its Constitutional arguments on the merits during the hearing" and "[t]herefore, such arguments will not lie to bar discovery of the factual situation underlying the allegations in this proceeding."

Faith then appealed to the Court of Appeals for the District of Columbia Circuit, but, at the FCC's urging, the case was dismissed because the interlocutory discovery rulings were not final agency orders appropriate for judicial review. Since no tribunal, administrative or judicial, had ruled on the merits of its religion clause objections to discovery, Faith Center continued to assert them.

As the hearing approached, the FCC filed a second set of interrogatories and a second motion to produce documents which broadened the time period at issue from 13 months to three years and which required disclosure of (1) information relating to all Church projects for which funds had been solicited; (2) records which would specifically identify each and every donor, each and every donation of each and every donor, how each and every donation was spent and each and every unpaid pledge of each and every pledgor; (3) records specifying the amounts of money raised for each church project and the manner in which the funds were segregated and spent; (4) pastor pertinent records, including the pastor's preaching notes and biblical commentary.

Faith Center reasserted its constitutional claims, but a successor administrative law judge again refused to rule on them, declaring that "[u]nder the law of this case. Faith's constitutional claims will not affect the Bureau discovery" and quoting the previous judge's discovery ruling. He directed Faith Center to respond, warning that failure to comply "may result in the dismissal of its renewal application." Again raising its constitutional claims. Faith unsuccessfully sought to appeal the interlocutory order to the FCC.

Unsatisfied with Faith Center's responses to the second wave of discovery, the Bureau sought an order to show cause why its renewal application should not be dismissed for failure to prosecute. Without ruling on the motion to show cause or considering lesser sanctions, the successor judge, acting on his own motion, dismissed the renewal application for failure to prosecute.

On appeal the FCC held that "Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm," that "[t]herefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders," and that "[a]bsent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery." The FCC repeatedly stressed that it was Faith's continued assertion of its regligion clause objections after the Court of Appeals dismissed its interlocutory appeal that warranted dismissal of the renewal application.

First, the FCC declared:

> We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. *Of critical significance* in reaching this conclusion *is Faith's continued failure to respond subsequent to the Court of Appeals' summary dismissal of its appeal on constitutional grounds* on July 13, 1979. At this point Faith's continuing nor compliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. (Emphasis supplied.)

Second, it asserted that:

> The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims ju-

> dicially. At this point, in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the Appeals Court Judges' determination as to the propriety of discovery requests. . . .

Third, it stated:

> While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. *Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application.* However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. (Emphasis added.)

The Court of Appeals for the District of Columbia Circuit summarily affirmed the FCC's order "generally for the reasons given by it" in its opinion.

REASONS FOR GRANTING THE WRIT.

The summary and perfunctory manner in which the FCC treated Faith Center's religion clause contentions in this case raises undecided constitutional questions of fundamental importance to religious liberty, questions which transcend the peculiar boundaries of this case, indeed, questions which are of grave concern to all religions and churches in our society. First, in the era of the "electronic church," the FCC's insistence that it will not vary its "normal scrutiny" of license renewal applications where the licensee is a church — that it is as free to intrude upon the internal affairs of a church as it is upon those of a purely commercial and secular licensee — presents the question whether FCC investigations into the internal affairs of church licensees must meet the rigorous standards this Court has held applicable to other forms of governmental inquiry touching First Amendment interest. Second, if so, the FCC's refusal to assess the competing interests at stake, to weigh the governmental need for discovery against the Church's interests in religious privacy and autonomy, raises the question whether the First Amendment requires the same procedural safeguards for adjudication of religion clause claims that this Court has held must be observed when free speech or association interests are at stake.

I.

Whether FCC Discovery Orders Intruding Into the Internal Affairs of a Church Licensee Must Satisfy the First Amendment's Compelling-Interest and Least-Restrictive-Alternative Standards Is an Important Constitutional Question.

Faith Center's religion clause claims — objecting to wholesale intrusion on its internal financial affairs, including the privacy of its donors — were more than colorable and, indeed, substantial. "This Court has recognized the vital relationship between freedom to associate and privacy

in one's associations," that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [an] effective . . . restraint on freedom of association," and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *Id.* at 460. For "religious worship and discussion" are "forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 102 S.Ct. 269, 274 (1981).

Not only does the First Amendment shelter the anonymity of an organization's members, *e.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), but also "the invasion of privacy of belief may be as great where the information sought concerns the giving and spending of money as when it concerns the joining of organizations,

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[1] "Although past cases have frequently acknowledged that the 'chilling effect' of compelled disclosure most severely affects organizations espousing unorthodox or unpopular views . . . the governing authorities do not support [the] . . . assertion that constitutional protection of anonymity of affiliation is *limited* to members of such groups." *Britt v. Superior Court*, 20 Cal.3d 844, 854, 574 P.2d 766, 143 Cal.Rptr. 695 (1978). Thus, in *Gibson v. Florida Legislative Investigation Commm.*, 372 U.S. 539, 556-57 (1963), this Court held that while privacy protections "are all the more essential . . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors," they also extend to "all legitimate organizations." *See Buckley v. Valeo*, 424 U.S. 1, 64-68 (1976) (protection has bearing in case of established political parties); *Pollard v. Roberts*, 283 F.Supp. 248, 258 (E.D. Ark. 1968) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968) (extending protection to Republican Party); *cf. Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Baird v. State Bar*, 401 U.S. 1 (1971). Dissident status, however, may affect the balance in determining whether the government interests in disclosure justify the resulting intrusions on associational privacy, *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), *quoting California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Indeed, First Amendment protection embraces "private associational information" and "private associational conduct" in general. *See, e.g., Ealy v. Littlejohn*, 569 F.2d 219, 227-31 (5th Cir. 1978) (subject matter of meetings, production of organizational leaflet, printed or oral communications of members, protest activity of members); *Bursey v. United States*, 466 F.2d 1059, 1084-88, *rehearing denied*, 466 F.2d 1090 (9th Cir. 1972) (identities of persons responsible for newspaper and pamphlet publication and distribution and the nature of such activity; identities of persons who associated within organization); *Britt v. Superior Court*, 20 Cal.3d 844, 848, 856, 861, 574 P.2d 766, 143 Cal.Rptr. 695 (1978) (subject matter of organization's meetings); *cf., e.g., United States v. United States District Court*, 407 U.S. 297, 320 (1972) ("Official surveillance [of communications] . . . risks infringement of constitutionally protected privacy of speech"); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

There should be no doubt that the FCC's discovery orders "penetrate[d] deeply into the internal affairs" of the church. *See Larson v. Valente*, 102 S.Ct. 1673, 1688 n.29 (1982). "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas." *Gibson*, 372 U.S. at 558, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality opinion). Because private associational affairs are "presumptively protected by the First Amendment," *e.g. Bursey v. United States*, 466 F.2d at 1082 and cases there cited, they "are presumptively immune from inquisition." *See e.g., Sweezy v. New Hampshire*, 354 U.S. at 266 (Frankfurter, J., concurring); *Britt v. Superior Court*, 20 Cal.3d

at 855; *cf., e.g., Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude,' " for such materials are "presumptively protected").

Thus, the Court has promulgated strict standards governing compelled disclosure of private associational matters. The party seeking disclosure bears the heavy burden of demonstrating that it is justified by "a subordinating interest which is compelling." *E.g., Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). "The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information." for "[v]alidation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 535. The party urging disclosure must therefore "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *id.* at 546, and this showing "must survive exacting scrutiny." *Buckley v. Valeo, supra*, 424 U.S. at 64. Finally, it must be shown that "the incidental infringement upon First Amendment rights is no greater than is essential to vindicate [the] . . . subordinating interests," *Bursey v. United States*, 446 F.2d at 1083, for those interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *E.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Hence, governmental investigation that chills expression "must be highly selective in order to survive challenge under the First Amendment." *See, e.g., Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

Perhaps because privacy and anonymity have played an important role in the history of religious liberty, *see Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Talley v. California*, 362 U.S. 60, 64-65 (1960), the courts have enforced these First Amendment standards especially meticulously where compelled disclosure of private religious matters is sought. *See, e.g., Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78-80 (1st Cir. 1979) (striking down administrative subpoena requiring production of financial records of Catholic schools because government had not borne burden of fully justifying resulting burden on free exercise of religion). In *Fernandes v. Limmer*, 465 F.Supp. 493, 504 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 51 U.S.L.W. 3174 (September 7, 1982), the court, striking down a local ordinance insofar as it required churches engaged in soliciting funds to submit to examination to their financial records, observed:

> No Church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the [church] and deal with it financially is great, as is the impact [on] the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside.

That even the most superficial and tentative inquiry into religious affairs trespasses on First Amendment protected ground is shown by *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the National Labor Relations Act did not cover teachers in church-operated schools. Construing the Act to avoid serious constitutional questions, the Court observed that if the Act embraced religious schools, "the very process of inquiry

leading to findings and conclusions" in unfair labor practice proceedings "may impinge on rights guaranteed by the Religion Clauses." 440 U.S. at 502. And it added that "[t]his kind of inquiry and its sensitivity" were "illustrated" by a hearing in which a monsignor was merely asked how many liturgies and masses are required at Catholic parochial high schools. *Id.* at 502 n. 10, 507-08; *see Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (terming, "burdensome and inquisitorial" an examination of religious dissenter conducted prior to licensing of public distribution of literature); *McCormick v. Hirsch*, 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) ("The reach of the investigatory powers [of the NLRB] into the financial affairs of the Church obviously creates the potential for breach of religious liberty").

These First Amendment standards carry full force when disclosure is compelled pursuant to a discovery order in civil litigation. *See Hastings v. North East Independent School Dist.*, 615 F.2d 628 (5th Cir. 1980); *UAW v. Nat'l Right to Work Legal Defense and Educ. Fund*, 590 F.2d 1139 (D.C. Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976); *Britt v. Superior Court*, 20 Cal.3d 844; *cf. Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1978); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment Co.*, 470 F.2d 778 (2nd Cir. 1972), *cert. denied* 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). This Court's decision in the *Alabama* case establishes that proposition beyond question, for the compelled disclosure there had been embodied in a discovery order issued in a civil lawsuit. "Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry

is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." *Britt*, 20 Cal.3d at 857; *see Carey v. Hume*, 492 F.2d at 636.

The FCC's contention that it may exercise its investigatory and inquisitorial powers against Church licensees as freely and broadly as against licensees which do not fall within the First Amendment mantle is, in essence, a claim that it, unlike other governmental agencies, enjoys a special exemption from traditional First Amendment standards. The FCC's power to regulate licensees in the public interest "cannot be invoked as a talismanic incantation to support any exercise of power which can be brought within its ambit" where First Amendment interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) ("war power"). That the effective exercise of First Amendment rights may undercut a given government's policy on some issues is, indeed, one of the purposes of those rights." *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667, 670 (7th Cir. 1979). The very premise of the First Amendment is that the Government, including the FCC, must regulate churches and religions differently — more sensitively and only on greater justification — than purely secular entities. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).[2] Moreover, that an

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[2]The FCC's holding that to accord favored treatment to Church licensees "would raise serious constitutional problems in itself" and that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture" is specious. "The dual prohibition" of the religion clauses distinguishes "the sphere of religious activity . . . from the secular intellectual liberties," and "legal restrictions cannot be applied to religious practices, as they can in much of the secular realm, merely on a showing of a rational relationship between the regulation imposed and the legitimate end sought." *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1155 (D.C. Cir. 1969). Courts have held that

(footnote continued on following page)

FCC license is a benefit or privilege — a matter of grace rather than a constitutional right — does not exempt FCC intrusions into private religious affairs from First Amendment scrutiny, for "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *E.g., Sherbert v. Verner*, 374 U.S. at 404.

Since the FCC in its original letter to Faith Center stated that the Church was, like any other licensee, subject to "the normal scrutiny of the Commission," the administrative law judges held that Faith's religion clause claims were not assertable during discovery proceedings. Hence they did not apply the traditional First Amendment standards in compelling Faith Center to respond to the discovery requests: indeed, they simply did not weigh Faith's constitutional claims.

The resulting orders compelling disclosure—violation of which served as the critical basis for the dismissal of Faith's renewal application—thus suffered constitutional defects arising from a profound failure to subject the Broadcast Bureau's need for the discovery to the required "exacting scrutiny." *See, e.g., Buckley v. Valeo*, 421 U.S. at 64. First, the Bureau was not required to show the relevance of the information sought, to demonstrate that it went to "the heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d at 713; *UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *Carey v. Hume*, 492 F.2d at 636. Quite the contrary, the FCC's opinion reversed the burden of proof on this score; it noted that "Faith has not dem-

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religions are entirely exempt from some governmental regulatory schemes. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. at 506-07; *Kedroff v. Saint Nicholas Cathedral*, 344U.S. 94, 117-19 (1952); *Surinach v. Pesquera de Busquets*, 604 F.2d at 76-80; *The Kings Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974). Relieving a church from a governmental burden under the free exercise clause thus simply does not violate the establishment clause. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 411 (1963).

onstrated that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." The Bureau thus was not required to describe the information it hoped to obtain and its importance to its case with reasonable specificity, but was allowed to proceed on the impermissible basis of mere speculation that the information might be useful. *See Cervantes v. Time, Inc.*, 464 F.2d at 994; *Pollard v. Roberts*, 283 F.Supp. at 257; *cf., e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224-25, 227 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963).

Second, the Bureau was not required to demonstrate that it had exhausted every reasonable alternative source of the information it sought by discovery directed at the church. *See UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *cf., Zerilli v. Smith*, 656 F.2d at 713; *Cary v. Hume*, 492 F.2d at 639; *Riley v. City of Chester*, 612 F.2d at 717-18; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d at 430; *Baker v. F & F Investment Co.*, 470 F.2d at 784; *Miller v. Transamerican Press, Inc.*, 621 F.2d at 726. The compulsion orders thus violated the principle that where First Amendment interests are at stake, "compelled disclosure * * * [is] normally the end and not the beginning of the inquiry." *See Zerilli v. Smith*, 656 F.2d at 713, *quoting Carey v. Hume*, 492 F.2d at 638.

While the Government must satisfy these compelling-interest and least-restrictive-alternative requirements whenever compelled disclosure intrudes upon the privacy of any presumptively protected association, *see supra*, n.1, the association is, as this court held just last month, entitled to show particular circumstances which diminish the governmental interests in the disclosure and/or increase the disclosure's potential for impairing First Amendment interests and which thus alter the balance to be drawn. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982). Hence the administrative law judge's rulings that Faith Center could not raise its First

Amendment claims at the discovery stage suffered a third constitutional defect: they deprived Faith Center of the opportunity to show particular circumstances increasing the burden of justification the Broadcast Bureau bore. *See id.*[3] This defect alone warrants vacation of the Court of Appeals decision and remand for reconsideration of this case in the light of *Brown*.

The administrative law judges' abnegation of their constitutional duty thus put Faith Center in the unconscionable dilemma of foregoing its religious privacy objections—claims never adjudicated or ruled upon—or insisting on its rights to a ruling on those objections, thus courting dismissal of its renewal application and loss of its television station.[4] Their promise that constitutional claims could be raised after discovery and the production of evidence was an empty one. For it ignored the undeniable fact that the constitutional damage—the compelled exposure of private religious matters in violation of the free exercise clause—occurs at the precise moment the disclosure takes place. That damage is, of course, irreparable, for no matter what the judge later does, he cannot undo the constitutional wrongs already wrought. The injury is worked by the compelled disclosure; the only remedy is to prevent that disclosure in the first instance, and that requires an immediate ruling on the merits of the constitutional claim.

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[3]Unorthodox religions are, of course, still subjected to widespread public condemnation as "cults" threatening established social values, and it is entirely conceivable that, given the opportunity, Faith Center could "show a 'reasonable probability' that the compelled disclosures will subject [its contributors and recipients of its disbursements] . . . to 'threats, harassment, or reprisals.'" *Brown*, 51 U.S.L.W. 4015, *quoting Buckley*, 424 U.S. at 74.

[4]Contrary to the FCC's opinion, the Court of Appeals' summary dismissal of Faith Center's appeal because it was interlocutory could not and did not "finally put to rest" its constitutional claims rearding the propriety of discovery and thus did not "clearly put [it] on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination." Faith has yet to receive any ruling on the merits of its constitutional objections to discovery.

The administrative law judges' failure to rule on Faith's constitutional claims ignores the Court's recognition that the procedures by which First Amendment claims are evaluated and resolved "assume an importance fully as great as the validity of the substantive rule of law to be applied" and that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Hence, the Court has constructed a "First Amendment 'due process' "—"a series of specific rules designed to prevent insensitive procedural devices from strangling First Amendment interests." Monaghan, *First Amendment "Due Process,"* 83 Harv. L.Rev. 518 (1970). Governmental intrusions upon interests in freedom of expression must "embody the most rigorous procedural safeguards" because that freedom is "vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), and compelled disclosure of associational matters constitutes a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. at 64.

Governmental restraint or seizure of expression must be preceded by an adversary judicial determination that it is not constitutionally prohibited.[5] *See e.g., Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965). Compelled disclosure of private associational matters constitutes an "effective restraint" on freedom of association. *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460,

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[5]An exception is made for restraints or seizures of alleged obscenity, but even there they must be followed by a prompt adversary judicial determination of their constitutionality. *See, e.g., Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965).

and it, too, should be preceded by an adversary determination of its constitutional validity.

Faith Center's constitutional claims, then, did not receive the due process the First Amendment commands. In the absence of a prior adversary determination of those claims, based on meticulous scrutiny of the Bureau's showing of its *need* for discovery, the orders compelling disclosure and the resulting dismissal of the renewal application are constitutionally invalid.[6] *See, e.g., UAW v. Nat'l Right to Work*, 590 F.2d at 1153.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: January 25, 1983.

Respectfully submitted,

PETER VAN NAME ESSER,

Counsel of Record for Amicus.

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[6]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, it is clear that the FCC deemed this continued assertion "[o]f critical significance in reaching" the conclusion that the renewal application should be dismissed for failure to comply with discovery orders. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970).

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FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF RELIGIOUS ORGANIZATIONS AND LAYMEN, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No. 82-867

IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF RELIGIOUS ORGANIZATIONS AND LAYMAN, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Interest of Amici.

Our interest as amici in this matter is substantial: we represent *8,000 churches* and *5.5 million* members and supporters. Accordingly, we will be among those first to feel the effects of rights lost by all if the Federal Communications Commission is allowed to compel disclosure of individual donation records. Said disclosure would violate the sacred commitments and constitutional rights, both religious and associational, of the First Amendment, and the right to privacy guaranteed by other amendments.

Moreover, the particular eccentricities of this matter are irrelevant to our interest. The principle remains that the lower court decision clearly states that the price of receiving

religious contributions to a church or ministry that broadcasts is that it no longer has religious freedoms, and that the FCC has unlimited right of supervision and intrusion, and unlimited disclosure to them of all records, including donation records and individual donation amounts. It is this precedent-setting and erroneous ruling that motivates our interest that this matter be resolved, not by a mere administrative agency, but the Supreme Court.

Copies of letters containing consent to the filing hereof are filed with the Clerk of the Court.

This case—in which the Federal Communications Commission dismissed a church's television license renewal application because it did not comply with broad discovery orders seeking information about internal church affairs—is of particular concern to the amici. For, if religion is to survive in the modern day, avenues of religious communication must remain as varied and broad as possible and religious privacy and autonomy must remain inviolate from governmental intrusions.

This case transcends in importance the immediate interests of the particular church involved as a litigant, for it carries consequences for religious freedoms generally. And it is from the perspective of these more general interests in religious freedom that the amici put this brief before the Court.

Statement of the Case.

Faith Center, Inc., a Christian church which holds a television station operating license, and the Federal Communications Commission (FCC) came to loggerheads over a question of religious liberty. Faith Center claimed that FCC discovery requests, made in a license renewal proceeding and seeking broad disclosure of its financial records, intruded upon religious privacy in violation of the free exercise

clause and entangled the Government in religious affairs in violation of the establishment clause, and it insisted that the FCC should weigh and rule on those claims before compelling it to comply. The FCC, however insisted that the fact that the licensee was a church did not place it "beyond the normal scrutiny of the Commission," and it therefore found no need to assess Faith Center's First Amendment claims. Faith Center nevertheless persisted in its contention that the FCC should balance its interests in religious liberty against the FCC's need for discovery. The upshot was that its license renewal application was dismissed for failure to comply with the discovery orders.

The FCC began an informal investigation of Faith Center's over-the-air fundraising activities, claiming it had received charges of wire fraud from two disgruntled former church employees. When FCC investigators sought to examine the church's financial records and to question its bookkeeping personnel, Faith Center, after responding in part, claimed in a letter to the FCC that the inquiry sought information protected from government intrusion by the First Amendment's religion clauses. Without receiving any brief on the matter, hearing arguments or conducting an evidentiary hearing, the FCC replied by letter that the church was subject to "the normal scrutiny of the Commission" like any other licensee. When Faith Center continued to assert its constitutional claims, the FCC set its license renewal application for hearing. The issues designated for hearing included the circumstances surrounding the Church's failure to allow Commission access to certain books, records and employees, whether its over-the-air fundraising broadcasts violated the federal wire fraud statute, and, as a consequence, whether renewal of Faith's license would serve the public interest.

When the Broadcast Bureau filed interrogatories and a motion to produce documents, Faith Center filed a brief contending that the discovery requests violated the religion clauses. After hearing arguments, the administrative law judge refused to rule on those constitutional claims and ordered Faith Center to comply with the discovery requests, stating that "if there are religious First Amendment defenses . . . those arguments can be made at the time of the hearing, after the evidence is in." And, in denying permission to appeal that ruling to the FCC, he declared that "Faith will be able to make its Constitutional arguments on the merits during the hearing" and "[t]herefore, such arguments will not lie to bar discovery of the factual situation underlying the allegations in this proceeding."

Faith then appealed to the Court of Appeals for the District of Columbia Circuit, but, at the FCC's urging, the case was dismissed because the interlocutory discovery rulings were not final agency orders appropriate for judicial review. Since no tribunal, administrative or judicial, had ruled on the merits of its religion clause objections to discovery, Faith Center continued to assert them.

As the hearing approached, the FCC filed a second set of interrogatories and a second motion to produce documents which broadened the time period at issue from 13 months to three years and which required disclosure of (1) information relating to all Church projects for which funds had been solicited; (2) records which would specifically identify each and every donor, each and every donation of each and every donor, how each and every donation was spent and each and every unpaid pledge of each and every pledgor; (3) records specifying the amounts of money raised for each church project and the manner in which the funds were segregated and spent; (4) pastor pertinent records, including the pastor's preaching notes and biblical commentary.

Faith Center reasserted its constitutional claims, but a successor administrative law judge again refused to rule on them, declaring that "[u]nder the law of this case, Faith's constitutional claims will not affect the Bureau discovery" and quoting the previous judge's discovery ruling. He directed Faith Center to respond, warning that failure to comply "may result in the dismissal of its renewal application." Again raising its constitutional claims, Faith unsuccessfully sought to appeal the interlocutory order to the FCC.

Unsatisfied with Faith Center's responses to the second wave of discovery, the Bureau sought an order to show cause why its renewal application should not be dismissed for failure to prosecute. Without ruling on the motion to show cause or considering lesser sanctions, the successor judge, acting on his own motion, dismissed the renewal application for failure to prosecute.

On appeal the FCC held that "Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm," that "[t]herefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders," and that "[a]bsent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery." The FCC repeatedly stressed that it was Faith's continued assertion of its religion clause objections after the Court of Appeals dismissed its interlocutory appeal that warranted dismissal of the renewal application.

First, the FCC declared:

> We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. *Of critical significance* in reaching this conclu-

> sion *is Faith's continued failure to respond subsequent to the Court of Appeals' summary dismissal of its appeal on constitutional grounds* on July 13, 1979. At this point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. (Emphasis supplied.)

Second, it asserted that:

> The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the Appeals Court Judges' determination as to the propriety of discovery requests. . . .

Third, it stated:

> While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. *Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application*. However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. (Emphasis added.)

The Court of Appeals for the District of Columbia Circuit summarily affirmed the FCC's order "generally for the reasons given by it" in its opinion.

REASONS FOR GRANTING THE WRIT.

The summary and perfunctory manner in which the FCC treated Faith Center's religion clause contentions in this case raises undecided constitutional questions of fundamental importance to religious liberty, questions which transcend the peculiar boundaries of this case, indeed, questions which are of grave concern to all religions and churches in our society. First, in the era of the "electronic church," the FCC's insistence that it will not vary its "normal scrutiny" of license renewal applications where the licensee is a church —that it is as free to intrude upon the internal affairs of a church as it is upon those of a purely commercial and secular licensee—presents the question whether FCC investigations into the internal affairs of church licensees must meet the rigorous standards this Court has held applicable to other forms of governmental inquiry touching First Amendment interests. Second, if so, the FCC's refusal to assess the competing interests at stake, to weigh the governmental need for discovery against the Church's interests in religious privacy and autonomy, raises the question whether the First Amendment requires the same procedural safeguards for adjudication of religion clause claims that this Court has held must be observed when free speech or associational interests are at stake.

I.

Whether FCC Discovery Orders Intruding Into the Internal Affairs of a Church Licensee Must Satisfy the First Amendment's Compelling-Interest and Least-Restrictive-Alternative Standards Is an Important Constitutional Question.

Faith Center's religion clause claims—objecting to wholesale intrusion on its internal financial affairs, including the privacy of its donors—were more than colorable

and, indeed, substantial. "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations," that "compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . [an] effective . . . restraint on freedom of association," and that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *Id.* at 460. For "religious worship and discussion" are "forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 102 S.Ct. 269, 274 (1981).

Not only does the First Amendment shelter the anonymity of an organization's members, *e.g.*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), but also

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[1] "Although past cases have frequently acknowledged that the 'chilling effect' of compelled disclosure most severely affects organizations espousing unorthodox or unpopular views . . . the governing authorities do not support [the] . . . assertion that constitutional protection of anonymity of affiliation is *limited* to members of such groups." *Britt v. Superior Court*, 20 Cal.3d 844, 854, 574 P.2d 766, 143 Cal.Rptr. 695 (1978). Thus, in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963), this Court held that while privacy protections "are all the more essential . . . where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors," they also extend to "all legitimate organizations." *See Buckley v. Valeo*, 424 U.S. 2, 64-68 (1976) (protection has bearing in case of established political parties); *Pollard v. Roberts*, 283 F.Supp. 248, 258 (E.D. Ark. 1968) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968) (extending protection to Republican Party); *cf. Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Baird v. State Bar*, 401 U.S. 1 (1971). Dissident status, however, may affect the balance in determining whether the government interests in disclosure justify the resulting intrusions on associational privacy. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982).

"the invasion of privacy of belief may be as great where the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), *quoting California Bankers Ass'n v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Indeed, First Amendment protection embraces "private associational information" and "private associational conduct" in general. *See, e.g., Ealy v. Littlejohn*, 569 F.2d 219, 227-31 (5th Cir. 1978) (subject matter of meetings, production of organizational leaflet, printed or oral communications of members, protest activity of members); *Bursey v. United States*, 466 F.2d 1059, 1084-88, *rehearing denied*, 466 F.2d 1090 (9th Cir. 1972) (identities of persons responsible for newspaper and pamphlet publication and distribution and the nature of such activity; identities of persons who associated within organization); *Britt v. Superior Court*, 20 Cal.3d 844, 848, 856, 861, 574 P.2d 766, 143 Cal.Rptr. 695 (1978) (subject matter of organization's meetings); *cf., e.g., United States v. United States District Court*, 407 U.S. 297, 320 (1972) ("Official surveillance [of communications] . . . risks infringement of constitutionally protected privacy of speech"); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

There should be no doubt that the FCC's discovery orders "penetrate[d] deeply into the internal affairs" of the church. *See Larson v. Valente*, 102 S.Ct. 1673, 1688 n. 29 (1982). "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas." *Gibson*, 372 U.S. at 558, *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality opinion). Because private associational affairs are "pre-

sumptively protected by the First Amendment," *e.g.*, *Bursey v. United States*, 466 F.2d at 1082 & cases there cited, they "are presumptively immune from inquisition." *See e.g.*, *Sweezy v. New Hampshire*, 354 U.S. at 266 (Frankfurter, J., concurring); *Britt v. Superior Court*, 20 Cal.3d at 855; *cf.*, *e.g.*, *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude,' " for such materials are "presumptively protected").

Thus, the Court has promulgated strict standards governing compelled disclosure of private associational matters. The party seeking disclosure bears the heavy burden of demonstrating that it is justified by "a subordinating interest which is compelling." *E.g.*, *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). "The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information," for "[v]alidation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 545. The party urging disclosure must therefore "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *id.* at 546, and this showing "must survive exacting scrutiny." *Buckley v. Valeo*, *supra*, 424 U.S. at 64. Finally, it must be shown that "the incidental infringement upon First Amendment rights is no greater than is essential to vindicate [the] . . . subordinating interests," *Bursey v. United States*, 466 F.2d at 1083, for those interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the

end can be more narrowly achieved." *E.g.*, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Hence, governmental investigation that chills expression "must be highly selective in order to survive challenge under the First Amendment." *See, e.g.*, *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961).

Perhaps because privacy and anonymity have played an important role in the history of religious liberty, *see Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961); *Talley v. California*, 362 U.S. 60, 64-65 (1960), the courts have enforced these First Amendment standards especially meticulously where compelled disclosure of private religious matters is sought. *See, e.g.*, *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 78-80 (1st Cir. 1979) (striking down administrative subpoena requiring production of financial records of Catholic schools because government had not borne burden of fully justifying resulting burden on free exercise of religion). In *Fernandes v. Limmer*, 465 F.Supp. 493, 504 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 51 U.S.L.W. 3174 (September 7, 1982), the court, striking down a local ordinance insofar as it required churches engaged in soliciting funds to submit to examination of their financial records, observed:

> No Church or political party should be compelled to bare itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such need is shown for disclosure, not established in this record, the potential for chilling effect on donors, members, and those who associate with the [church] and deal with it financially is great, as is the impact [on] the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside.

That even the most superficial and tentative inquiry into religious affairs trespasses on First Amendment protected ground is shown by *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court held that the National Labor Relations Act did not cover teachers in church-operated schools. Construing the Act to avoid serious constitutional questions, the Court observed that if the Act embraced religious schools, "the very process of inquiry leading to findings and conclusions" in unfair labor practice proceedings "may impinge on rights guaranted by the Religion Clauses." 440 U.S. at 502. And it added that "[t]his kind of inquiry and its sensitivity" were "illustrated" by a hearing in which a monsignor was merely asked how many liturgies and masses are required at Catholic parochial high schools. *Id.* at 502 n. 10, 507-08; *see Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (terming, "burdensome and inquisitorial" an examination of religious dissenter conducted prior to licensing of public distribution of literature); *McCormick v. Hirsch*, 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) ("The reach of the investigatory powers [of the NLRB] into the financial affairs of the Church obviously creates the potential for breach of religious liberty").

These First Amendment standards carry full force when disclosure is compelled pursuant to a discovery order in civil litigation. *See Hastings v. North East Independent School Dist.*, 615 F.2d 628 (5th Cir. 1980); *UAW v. Nat'l Right to Work Legal Defense and Educ. Fund*, 590 F.2d 1139 (D.C. Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976); *Britt v. Superior Court*, 20 Cal.3d 844; *cf. Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th

Cir. 1978); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment Co.*, 470 F.2d 778 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). This Court's decision in the *Alabama* case establishes that proposition beyond question, for the compelled disclosure there had been embodied in a discovery order issued in a civil lawsuit. "Indeed, in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." *Britt*, 20 Cal.3d at 857; *see Carey v. Hume*, 492 F.2d at 636.

The FCC's contention that it may exercise its investigatory and inquisitorial powers against Church licensees as freely and broadly as against licensees which do not fall within the First Amendment mantle is, in essence, a claim that it, unlike other governmental agencies, enjoys a special exemption from traditional First Amendment standards. The FCC's power to regulate licensees in the public interest "cannot be invoked as a talismanic incantation to support any exercise of power which can be brought within its ambit" where First Amendment interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) ("war power"). "That the effective exercise of First Amendment rights may undercut a given government's policy on some issues is, indeed, one of the purposes of those rights." *International Society for Krishna Consciousness v. Bowen*, 600 F.2d 667, 670 (7th Cir. 1979). The very premise of the First Amendment is that the Government, including the FCC, must regulate churches and religions differently—

more sensitively and only on greater justification—than purely secular entities. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).[2] Moreover, that an FCC license is a benefit or privilege—a matter of grace rather than a constitutional right—does not exempt FCC intrusions into private religious affairs from First Amendment scrutiny, for "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *E.g., Sherbert v. Verner*, 374 U.S. at 404.

Since the FCC in its original letter to Faith Center stated that the Church was, like any other licensee, subject to "the normal scrutiny of the Commission," the administrative law judges held that Faith's religion clause claims were not assertable during discovery proceedings. Hence they did not apply the traditional First Amendment standards in compelling Faith Center to respond to the discovery requests; indeed, they simply did not weigh Faith's constitutional claims.

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[2]The FCC's holding that to accord favored treatment to Church licensees "would raise serious constitutional problems in itself" and that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture" is specious. "The dual prohibition" of the religion clauses distinguishes "the sphere of religious activity . . . from the secular intellectual liberties," and "legal restrictions cannot be applied to religious practices, as they can in much of the secular realm, merely on a showing of a rational relationship between the regulation imposed and the legitimate end sought." *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1155 (D.C. Cir. 1969). Courts have held that religions are entirely exempt from some governmental regulatory schemes. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. at 506-07; *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 117-19 (1952); *Surinach v. Pesquera de Busquets*, 604 F.2d at 76-80; *The Kings Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974). Relieving a church from a governmental burden under the free exercise clause thus simply does not violate the establishment clause. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972); *Sherbert v. Verner*, 374 U.S. 398, 411 (1963).

The resulting orders compelling disclosure—violation of which served as the critical basis for the dismissal of Faith's renewal application—thus suffered constitutional defects arising from a profound failure to subject the Broadcast Bureau's need for the discovery to the required "exacting scrutiny." *See, e.g., Buckley v. Valeo*, 421 U.S. at 64. First, the Bureau was not required to show the relevance of the information sought, to demonstrate that it went to "the heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d at 713; *UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *Carey v. Hume*, 492 F.2d at 636. Quite the contrary, the FCC's opinion reversed the burden of proof on this score; it noted that "Faith has not demonstrated that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." The Bureau thus was not required to describe the information it hoped to obtain and its importance to its case with reasonable specificity, but was allowed to proceed on the impermissible basis of mere speculation that the information might be useful. *See Cervantes v. Time, Inc.*, 464 F.2d at 994; *Pollard v. Roberts*, 283 F.Supp. at 257; *cf., e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224-25, 227 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963).

Second, the Bureau was not required to demonstrate that it had exhausted every reasonable alternative source of the information it sought by discovery directed at the church. *See UAW v. Nat'l Right to Work*, 590 F.2d at 1153; *cf., Zerilli v. Smith*, 656 F.2d at 713; *Carey v. Hume*, 492 F.2d at 639; *Riley v. City of Chester*, 612 F.2d at 717-18; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d at 430; *Baker v. F & F Investment Co.*, 470 F.2d at 784; *Miller v. Transamerican Press, Inc.*, 621 F.2d at 726. The compulsion orders thus violated the principle that where First Amendment interests are at stake, "compelled disclosure * * *

[is] normally the end and not the beginning of the inquiry." *See Zerilli v. Smith*, 656 F.2d at 713, *quoting Carey v. Hume*, 492 F.2d at 638.

While the Government must satisfy these compelling-interest and least-restrictive-alternative requirements whenever compelled disclosure intrudes upon the privacy of any presumptively protected association, *see supra*, n. 1, the association is, as this court held just last month, entitled to show particular circumstances which diminish the governmental interests in the disclosure and/or increase the disclosure's potential for impairing First Amendment interests and which thus alter the balance to be drawn. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 51 U.S.L.W. 4015 (Dec. 8, 1982). Hence the administrative law judge's rulings that Faith Center could not raise its First Amendment claims at the discovery stage suffered a third constitutional defect: they deprived Faith Center of the opportunity to show particular circumstances increasing the burden of justification the Broadcast Bureau bore. *See id.*[3] This defect alone warrants vacation of the Court of Appeals' decision and remand for reconsideration of this case in the light of *Brown*.

The administrative law judges' abnegation of their constitutional duty thus put Faith Center in the unconscionable dilemma of foregoing its religious privacy objections—claims never adjudicated or ruled upon—or insisting on its rights to a ruling on those objections, thus courting dismissal

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[3]Unorthodox religions are, of course, still subjected to widespread public condemnation as "cults" threatening established social values, and it is entirely conceivable that, given the opportunity, Faith Center could "show a 'reasonable probability' that the compelled disclosures will subject [its contributors and recipients of its disbursements] . . . to 'threats, harassment, or reprisals.' " *Brown*, 51 U.S.L.W. 4015, *quoting Buckley*, 424 U.S. at 74.

of its renewal application and loss of its television station.[4] Their promise that constitutional claims could be raised after discovery and the production of evidence was an empty one. For it ignored the undeniable fact that the constitutional damage—the compelled exposure of private religious matters in violation of the free exercise clause—occurs at the precise moment the disclosure takes place. That damage is, of course, irreparable, for no matter what the judge later does, he cannot undo the constitutional wrongs already wrought. The injury is worked by the compelled disclosure; the only remedy is to prevent that disclosure in the first instance, and that requires an immediate ruling on the merits of the constitutional claim.

The administrative law judges' failure to rule on Faith's constitutional claims ignores the Court's recognition that the procedures by which First Amendment claims are evaluated and resolved "assume an importance fully as great as the validity of the substantive rule of law to be applied" and that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-21 (1958). Hence, the Court has constructed a "First Amendment 'due proces' "—"a series of specific rules designed to prevent insensitive procedural devices from strangling First Amendment interests." Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). Governmental intrusions upon interests in freedom of expression must "embody the most rigorous procedural

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[4]Contrary to the FCC's opinion, the Court of Appeals' summary dismissal of Faith Center's appeal because it was interlocutory could not and did not "finally put to rest" its constitutional claims regarding the propriety of discovery and thus did not "clearly put [it] on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination." Faith has yet to receive any ruling on the merits of its constitutional objections to discovery.

safeguards" because that freedom is "vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), and compelled disclosure of associational matters constitutes a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. at 64.

Governmental restraint or seizure of expression must be preceded by an adversary judicial determination that it is not constitutionally prohibited.[5] *See e.g., Carroll v. President & Comm'ners of Princess Anne*, 393 U.S. 175, 183 & n. 10 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965). Compelled disclosure of private associational matters constitutes an "effective restraint" on freedom of association, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, and it, too, should be preceded by an adversary determination of its constitutional validity.

Faith Center's constitutional claims, then, did not receive the due process the First Amendment commands. In the absence of a prior adversary determination of those claims, based on meticulous scrutiny of the Bureau's showing of its *need* for discovery, the orders compelling disclosure and the resulting dismissal of the renewal application are constitutionally invalid.[6] *See e.g., UAW v. Nat'l Right to Work*, 590 F.2d at 1153.

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[5]An exception is made for restraints or seizures of alleged obscenity, but even there they must be followed by a prompt adversary judicial determination of their constitutionality. *See e.g., Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965).

[6]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, it is clear that the FCC deemed this continued assertion "[o]f critical significance in reaching" the conclusion that the renewal application should be dismissed for failure to comply with discovery orders. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970).

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Dated: January 25, 1983.

Respectfully submitted,

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